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Internet:
www.butterworths-hk.com
E-mail addresses:
christine.gonsalves@butterworths-hk.com
edmund.cham@butterworths-hk.com

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IPBA News

Legal Update

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The President's Report

As President-elect, I spent the vast majority of my time organizing and preparing for the Tokyo Conference and had little time to focus on the day-to-day management issues that are involved in running a large organization like the IPBA. Frankly speaking, the duties of President-elect were so draining that it took me a number of weeks after the Tokyo Conference just to recover my former energy level. With my energy level revitalized, however, I knew it was necessary to roll up my sleeves and carry out the duties of President that had been entrusted to me by the IPBA membership. Accordingly, I contacted a great number of individuals, including past Presidents and the staff of the Secretariat, to try to get a pulse on the current situation of the IPBA and the issues facing our organization. The following are some of my concerns and ideas.

Drop in Membership

Probably one of the most worrisome circumstances is the discovery that as of the 4 September 2001 cut-off date for renewing memberships, there has been a precipitous drop in membership over the last year from approximately 1,900 to 1,600 members. Members are the life blood of the IPBA. They provide vital ideas and content to IPBA programs and meetings. For the IPBA to survive its second decade, it is essential to build a strong membership base. Responsible fulfillment of their duties demands constant effort to solicit new members and ensure renewals by existing members, and the responsibility for ensuring a strong membership does not merely lie with the Membership Committee, Officers and Council Members, but with all members. I would therefore implore each and every member to do his or her best to solicit new members. In any meeting with non-member lawyers there is nothing to be lost by giving a fond introduction to the IPBA (and perhaps your latest edition of this Journal) and encouraging them to sign up. If you have enjoyed the IPBA, chances are good they will too!

In any event, we, as a body, have to analyze the reasons for the drop in membership and do something to reverse the trend. My challenge to all members is to take active steps, be it solicitation of other lawyers in your firm or other lawyers you chance to meet, so that we can raise the IPBA membership level to the 2,000 mark in time for the Annual Meeting and Conference in Hong Kong.

IPBA Journal and Website

We are fortunate to have a fine Journal and website through which members can exchange ideas and communicate with each other. These are some of the benefits that come with being IPBA members. Under the leadership of Jim FitzSimons, the website has been improving day by day. Nonetheless, both the website and the Journal are only as good as their content. I would encourage all members to give first consideration to our Journal and website when writing articles for publication or, for that matter, whenever writing a memorandum on a point of law that might also be of interest to our international membership.

Surplus Cash

Thanks to the efforts in the first decade, the IPBA has enjoyed financial success and currently has a cash surplus of approximately $900,000. Of course, some portion of that surplus should probably be invested and put aside for a rainy day, but the remainder should be spent in a way that will be of benefit to members. The question that arises is how to spend that money. For example, should we have some kind of special program for members? Should we use it for legal aid? I am most eager to hear any interesting ideas regarding this issue and invite anyone with a good idea to contact me.

Reinventing the IPBA

The essential ingredients for a strong and robust IPBA are committed and active members, diverse committees, and a continually creative leadership. IPBA members must not shrink from thinking of new ways to make the IPBA better than it already is and must be vigilant not to

allow the organization to fall into a complacent posture. Perhaps the time has come to review internal IPBA procedures and determine if they are the best means of attracting new members, ensuring strong committees, and allowing new blood into leadership positions.

Resolution of issues facing the IPBA can only be accomplished through an open dialogue with members, backed by the help and support of all those who care about the future of the IPBA.

Your comments, suggestions and active assistance regarding all issues affecting the IPBA will be most appreciated and welcome at any time. I plan to raise the above concerns and others for discussion at the Mid-Year Council Meeting and shall report back on the results.

Nobuo Miyake
President

IPBA WEBSITE DISCUSSION FORUM

The IPBA is pleased to announce the addition of a discussion forum to our website. The forum will allow ongoing, threaded discussions on various topics. To access the forum, go to http://www.ipba.org and click on the discussion link in the 'Members Only' section. You will be prompted for a login and password, which you can fill in with:

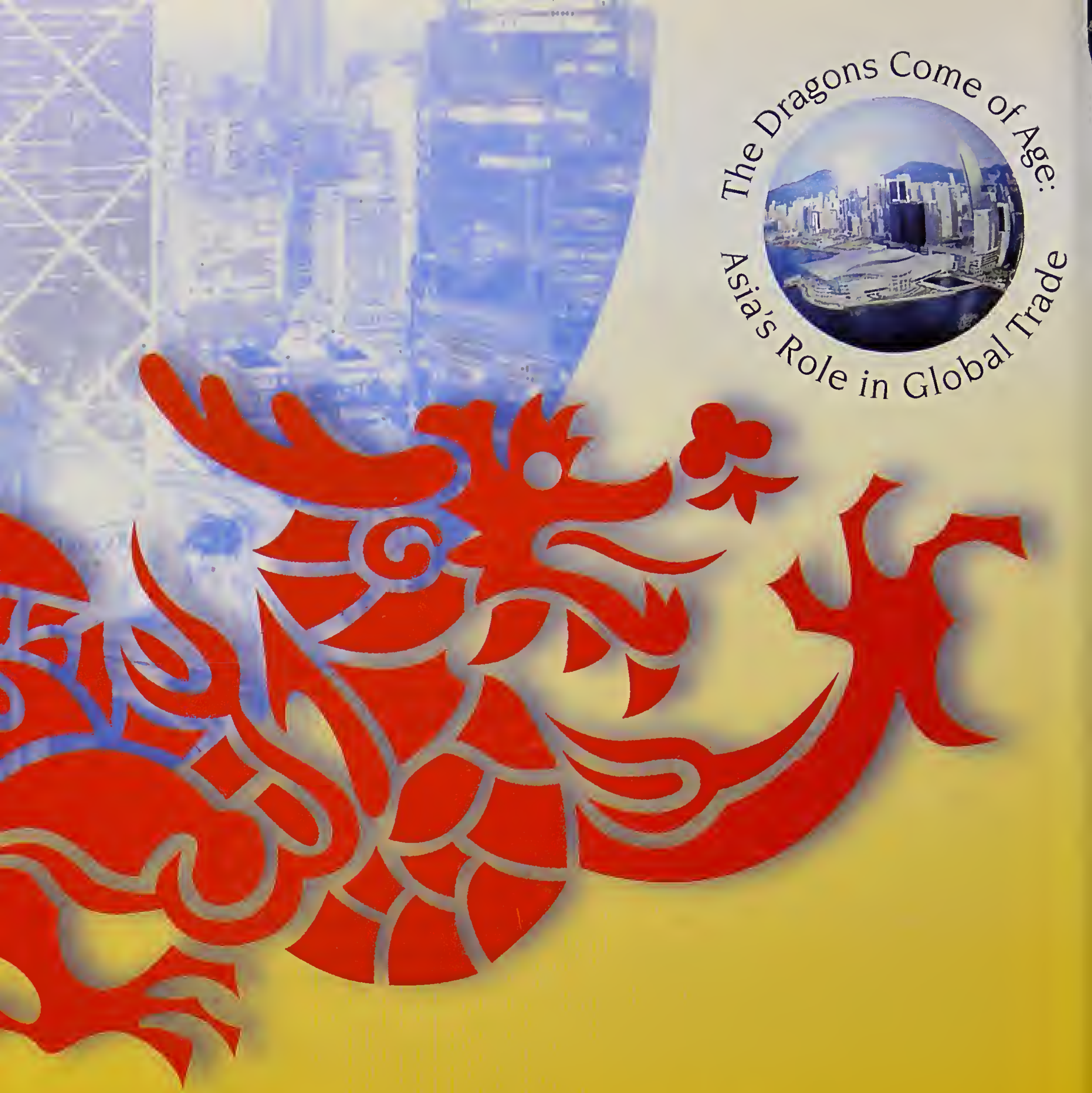
Login: discuss

Password: members

From there you can choose a topic from the drop-down list. You can then read messages that have been posted, reply to those messages, or create a new message of your own. If you would like to attach a relevant document to your message, such as a Word, Acrobat, or graphic file, simply click on the browse button to choose the document.

This is a great opportunity for IPBA members to exchange ideas and keep in touch wherever they are. Everyone should try it out!

If you would like to have a discussion topic area added to the site, send your requests to: jfitzsimons@claytonutz.com.au.



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12th Annual Meeting and Conference

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Report of the Insolvency Committee on the 11th Annual IPBA Conference

The 11th Annual IPBA Conference provided an invaluable opportunity for participants to be briefed on the latest developments in the insolvency laws in jurisdictions within the Asia-Pacific region and beyond. Geoff Sutherland reports

The 11th Annual Conference of the IPBA was held in Tokyo, Japan from 22 to 25 April 2001.

The Insolvency Committee, chaired by Arnold M Quittner, met for two sessions. On the afternoon of 24 April the topic was "Rights, Powers and Duties of the Debtor and Creditors in Insolvency Proceedings". On the morning of 25 April the topic was "Cross-Border Insolvencies and Global Harmonization". Both sessions were excellently attended. It will come as no surprise to anyone who had observed a seminar chaired by Arnold that the discussion throughout both sessions was lively, interesting and informative.

Once again, Arnold had organized two outstanding panels, featuring four distinguished guest speakers – Gerold Herrmann, recently retired Secretary General of UNCITRAL; Gordon Johnson, Senior Counsel, World Bank; Clare Wee, Senior Counsel, Asian Development Bank (ADB); and Judge Wisitsora-At from Thailand. Other panellists included Professor Charles Booth from the University of Hong Kong as well as leading partners from major commercial law firms in Japan, Korea, China, Singapore, India, Canada, Australia and New Zealand.

The first session on "Rights, Powers and Duties of the Debtor or Creditors in Insolvency Proceedings" involved a discussion by the panel (and many of the audience) on the comparison among various jurisdictions of the different systems of reorganization and turnaround legislation, the role of management in insolvency, the position of secured creditors in reorganization cases, the rights of employees in insolvency proceedings, and compensation for insolvency professionals, a well as a brief commentary on the most significant recent development in insolvency law in each jurisdiction.

The session on "Cross-Border Insolvencies and Global Harmonization" looked at the law and practise of cross-border insolvency law, including questions of comity, recognition of foreign proceedings and protocols in cross-border administrations.

UNCITRAL

Gerold Herrmann from UNCITRAL reported on the steady but satisfactory acceptance of the UNCITRAL Model Law on cross-border insolvency. The Model Law aims to provide a consistent and straightforward mechanism for countries to recognize foreign insolvency proceedings and to provide agreed principles for mutual cooperation in multi-national insolvencies. Under the Model Law, domestic courts are required to cooperate "to the maximum extent possible" with foreign courts and foreign insolvency representatives. It enables the courts to communicate directly with and request information and assistance from each other. It also provides for the coordination of proceedings in different countries involving the same debtor. Although legislative enactment of the Model Law has been slow, in May 2000 Mexico adopted the Model Law and in November 2000 South Africa also passed the appropriate legislation. Enacting legislation has been before the US Congress, but it has been caught up in domestic politics and remains in bill form.

Mr Herrmann also provided an update on the UNCITRAL draft Legislative Guide on Insolvency Law. This is a new initiative which aims to provide an effective and efficient legal framework for insolvency. It aims to set out agreed international principles dealing with the basis upon which creditors or debtors can have early use of and access to the protection afforded by insolvency law, as well as to establish

international principles on such matters as distinguishing between liquidation and reorganization, the criteria for the commencement of insolvency procedures, what property forms part of the insolvent estate, the extent of any moratorium on creditors, the effect on existing contracts, anti-avoidance measures, the position of management in insolvency, the role of creditors committees, and other significant issues in every system of insolvency law.

Although this seemed like a far-fetched dream when first proposed, significant progress has already been made, most particularly at the Global Insolvency Colloquium held in Vienna in December 2000. Submissions on the draft have been received from the major international professional insolvency bodies and they are presently being considered by the UNCITRAL Working Group on Insolvency Law who held a meeting for that purpose in New York from 23 July to 3 August 2001.

World Bank

Gordon Johnson reported on two significant recent developments at the World Bank under his initiative. The World Bank's "Principles and Guidelines for Effective Insolvency and Creditor Rights Systems" has been prepared by the World Bank in collaboration with regional development banks and international professional insolvency organizations, largely in response to the 1997-98 financial crisis in emerging markets. The aim of the Principles and Guidelines is to establish a uniform framework for assessing the effectiveness of insolvency and creditors' rights systems, and to offer guidance to policy makers on the policy choices needed to strengthen those systems. It does not aim to provide any draft legislation – that is a matter to be taken up by UNCITRAL. It aims to provide policy directions based on principles distilled from experience in the world's leading economies.

The Principles and Guidelines look at the role of enforcement systems, efficient systems for creditors' rights, a legal framework for secured lending, a legal framework for corporate insolvency, a framework for informal corporate workouts, and the institutions responsible for enforcing the insolvency system.

Gordon also reported on the Global Insolvency Law Database (GILD) which is a massive project being undertaken by the World Bank. GILD will provide a database which offers legislators and policy makers on-line access to the world's insolvency laws and systems together with detailed expert commentary on each of the insolvency laws. The objective is to help bridge the gap which exists in many developing and emerging economies by providing a broad base of fundamental training and other material for local officials, judges and professionals, and for that information to be immediately available by Internet access. Gordon expects GILD to enhance international awareness of the benchmarking of systems against international best practise, which should encourage better informed policy setting and law development reform practices in insolvency law. Each country's site will provide an overview of the domestic insolvency process on a range of themes which follows a uniform template. These overviews will be supplemented by legislation in the electronic format and, where available, rules and official forms. When completed it will constitute one of the largest resources of intellectual property available for long-distance learning in emerging markets.

ADB

Clare Wee provided a significant bonus for delegates by receiving and distributing on the morning of 25 April the very first copies of the ADB's "Guide to Restructuring in Asia 2001". This Guide provides a review of the legal and financial issues in insolvency in 11 Asian jurisdictions by leading insolvency lawyers and accountants. Further copies of this highly informative Guide are available from Clare Wee at the ADB.

Clare also discussed the project for the Development of the Internet for Asian Law (DIAL). DIAL is a regional technical assistance project funded by the ADB, and has created the largest collection of full text legislation in Asia Pacific. It provides a catalogue of hypertext links, a search engine and an e-mail based forum. DIAL links to legislation from 100 jurisdictions worldwide, together with hundreds of law journals and much other material.

Clare also discussed the ADB's law and policy reform activities, and distributed the 2000 edition of "Law and Policy Reform at the Asian Development Bank".

Every year there are significant developments in insolvency law in the jurisdictions on both sides of the Pacific. The last 12 months have been no exception.

Japan

It was significant and helpful that the meeting was held in Japan. Panellists Yuki Sakai and Watanab Kosei Watanabe were able to lead discussions, to which many leading Japanese insolvency law practitioners present at the conference contributed, considering the first year of the implementation of the Civil Rehabilitation Law which commenced on 1 April 2000. Yuki Sakai also addressed the major legislative changes contained in the Law Concerning Recognition of and Assistance Toward Foreign Insolvency Proceedings and the Law to Amend a Portion of Civil Rehabilitation Law, both of which came into effect on 1 April 2001. These pieces of legislation were enacted in order to abolish the previous Japanese system of rigid territoriality in cross-border insolvency law, as well as to introduce procedures to recognise foreign insolvency proceedings based upon the UNCITRAL model cross-border insolvency law. For the first time it is expected that the insolvency proceedings of Japan will be able to be handled in cooperation and harmonization with foreign insolvency proceedings. The amendments are extensive and are certainly greatly welcomed by insolvency practitioners in other jurisdictions.

Delegates were also treated to an extremely interesting discussion on the use of the new Civil Rehabilitation Law in practise. It has been used in the insolvency of SOGO, even though it would seem that very few Japanese practitioners expected the law to be used in such a major insolvency.

China

Ariel Ye reported on the slow progress towards new bankruptcy legislation in China. She reported that there is currently no unified bankruptcy law that is applicable to all types of companies and enterprises in China, even though the need for a comprehensive piece of legislation has been recognized and has been in the drafting process since 1994. A new draft bankruptcy law was released in 2000 which recognizes a process for reorganization or restructuring of a company, but it seems that political difficulty will prevent this legislation from becoming law for some considerable time.

Clare Wee made the significant point that there are major practical considerations that must be taken into account when dealing with the implementation of insolvency laws in an emerging market such as China. In order to enforce such legislation, it will be necessary for there to be a massive increase in the number of trained and experienced insolvency professionals. Five thousand such professionals would be needed in China, but prior to the regional economic problems in 1997-98, there were only about 100 in the entire region.

Ariel Ye reported that the legislation is currently in its 6th or 7th draft and that it will be at least another 2 or 3 years before there is any real progress. It is still uncertain if the legislation will apply to State owned enterprises, and the view of the Government appears to be that they have to clean up the current mess, particularly in respect of GITIC, before they embark on such an adventurous piece of legislation.

Thailand

Judge Wisitsora-At, who has been the representative of Thailand participating at the UNCITRAL Working Group and Commission Meetings on the cross-border insolvency model law, reported on the prospects for Thailand to move from its present bankruptcy laws, which are drafted on the basis of a strict territorial approach to such matters, towards a more open universal approach involving recognition of foreign insolvencies and working in harmony with foreign insolvency administrations. Thailand is starting from a very restricted position. There is still no treaty between Thailand and any other country on the recognition of foreign judgments. Although there is a strict territorial approach to liquidations, the Thai bankruptcy law introduced on 10 April 1998 did not contain any territorial restrictions on cross-border issues in relation to Court-supervised reorganization and rescues, and officials in Thailand have ruled that, whereas the liquidation under bankruptcy law is restricted to the theory of territoriality, the reorganisation process is not.

Judge Wisitsora-At reported that the specialist Central Bankruptcy Court established in 1999 to hear only bankruptcy cases has been functioning extremely successfully.

The next significant step in Thailand is likely to be the work of a Cabinet Committee which is undertaking to re-write the entire bankruptcy law. Hopefully it will remove, or at least significantly soften, the territorial approach on cross-border insolvency issues.

Hong Kong

Professor Charles Booth reported on the continuing efforts to introduce a modern system of corporate restructuring or rehabilitation in Hong Kong. He reported that, because of the

lack of an effective formal rescue procedure in Hong Kong, corporate rescue has been pursued either through the unsatisfactory procedure of receivership, or by means of guidelines for multi-bank lending situations called the "Hong Kong Approach to Corporate Difficulties" jointly issued by the Hong Kong Association of Banks and the Hong Kong Monetary Authority in November 1999. The HK Approach recognizes that the initial attitude of banks to distressed companies should be supportive and the bank should not withdraw credit facilities or hastily appoint a receiver. It includes a stand-still process, but the Approach suffers from the severe weaknesses that it is a voluntary process that requires unanimity of all banks, and that creditors other than banks are not parties to the guidelines.

A proposed new formal rescue procedure, known as "Provisional Supervision", forms the basis of draft laws which were gazetted in January 2000 in the Companies (Amendment) Bill 2000. The proposed scheme was intended to provide a flexible framework for corporate rescue and involved the appointment of a provisional supervisor to assume control over the company and to prepare a corporate rescue proposal, which would be put to creditors for resolution. The legislation ran into serious problems in 2000 and was removed from the 2000 legislative agenda. The major problems concerned the provisions that would have permitted creditors generally to pass a proposal that would impair the rights of secured creditors without first securing their consent, and the further provision that required as a precondition for the commencement of provisional supervision that the company satisfied all monies owing to employees.

At the time of the IPBA Conference, Professor Booth reported that it appeared that the Government would withdraw its proposal to allow unsecured creditors to force a "haircut" upon secured creditors, but it would still require a company to settle all outstanding debts and liabilities owed to employees before commencing provisional supervision. Hopefully the new legislation will finally be put in place this year.

Jonathan Crook reported from Hong Kong on the Peregrine protocol. The principal liquidation of Peregrine Investment Holdings Limited (PIHL) was commenced in Bermuda, where PIHL was incorporated. A Hong Kong liquidator was also appointed, which had the effect that the Hong Kong liquidation was an ancillary proceeding even though the majority of PIHL's business was in Hong Kong. Fortunately the substantive laws of both Hong Kong and Bermuda pertaining to winding up of insolvent companies are largely identical. The liquidators in Hong Kong and Bermuda applied to their respective courts to enter into a Protocol in order to coordinate the windings-up and to ensure the orderly and efficient administration of proceedings in the two jurisdictions. The Protocol has been approved, and Jonathan reported that it has considerably simplified the liquidation procedure, whilst protecting judicial comity.

The United States

Arnold Quittner reported on the major bankruptcy legislation which is pending before the United States Congress. The legislation will make it much more difficult for individual debtors to file a Chapter 7 (which provides for the voluntary or involuntary liquidation of the debtor's assets) or Chapter 13 (which provides for the reorganization of the affairs of an individual with a regular income) bankruptcy and to discharge their debts. It has been opposed by consumer groups, but it is expected to be passed by the Congress provided that the Republican Party retains control of both Houses.

In addition to the consumer aspects of the proposed legislation, it is widely expected that a new Chapter 15 will be enacted to deal with international insolvency to replace the current Sections 304 and 305 that deal with ancillary proceedings in cross-border insolvency. The new Chapter 15 would be based on the UNCITRAL model law.

Mr Quittner reported on the decision in the *Treco* case in which the US Court of Appeals for the Second Circuit, in a unanimous opinion issued only a few days prior to the IPBA Conference, reversed earlier decisions of the District Court and the Bankruptcy Court. This is an important decision relating to Section 304 of the Bankruptcy Code. Section 304 empowers a foreign insolvency representative to invoke the powers of the US Bankruptcy Court in aid of the foreign bankruptcy proceedings. The US Bankruptcy Court may restrain the commencement or continuation of any action against the foreign debtor, or against the property of the debtor, in the US. It may also order the turnover of property of the estate of the debtor to the foreign insolvency administrator.

In the *Treco* case, the Bank of New York had made a loan in New York to a Bahamian corporation. The loan was pursuant to a loan agreement governed by New York law. Under

the loan agreement, the Bahamian corporation had to maintain a cash deposit with the Bank of New York, over which the Bank had a security interest and a right of set-off. The Bank of New York was therefore a secured creditor to the extent of the amount on deposit. The borrower was wound up under Bahamian law, and the Bahamian liquidators commenced an ancillary proceeding under Section 304 and demanded turnover of the deposit. The Bahamian liquidator argued that the bank accounts of the Bahamian debtor company were property of the insolvent estate of that company in the Bahamian liquidation proceedings, and that just treatment of all creditors could only be ensured by repatriating to the Bahamian proceedings the debtor's accounts so that the assets could be distributed according to the provisions of the Bahamian Companies Act. Under Bahamian law, as opposed to US law, the Bank's security would be subordinated to the administrative costs of the liquidation, taxes, employees' wages and claims arising out of personal injuries to employees. Due to the considerable amount of money that those priorities involved, the Bank claimed that it was questionable whether anything would be available to cover its secured claim.

The Bahamian liquidators succeeded before the Bankruptcy Court and the District Court, but the Court of Appeals for the Second Circuit overturned those judgments and held that the Bank of New York was not obliged to turn over the cash deposit to the liquidators.

India

Shahnaz Rasul Ahmed reported that the Government of India has finally decided to constitute a committee (the Eradi Committee) consisting of experts to examine possible reforms to the existing insolvency laws. The delays in the hearing of insolvency matters by the court system in India are appalling and cases can take over 10 years to be heard. She reported that the average time in completing the winding up process of a company under a court winding up is more than 10 years. The recommendations of the Eradi Committee have recognized that the insolvency law of India should not only provide for the quick disposal of assets but should also explore the possibility of rehabilitation and revival of companies. It has urged that a National Tribunal be established as a specialised agency to deal with matters relating to the rehabilitation, revival and winding up of companies. The Eradi Committee has noted the inordinate delays in winding up of companies in India, and the great contrast in the winding up procedure in India and foreign countries. The Committee strongly felt that the winding up procedures must be such as would radically expedite the sale of assets. Hopefully appropriate legislation will be introduced in India establishing the National Tribunal and providing it with sufficient resources, so as to enable it to bring Indian insolvency law and practise up to the standard required to enable businesses to operate in India.

Canada

Patrick Shea and David Ward reported on developments in Canada. Canada has a somewhat unusual legislative position in that there are two insolvency statutes, the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act (CCAA), both of which deal with insolvency of corporations. As a general rule, the CCAA reorganizations involve large businesses with complex financial structures where a more flexible framework is required. The Canadian Government is undertaking a review program of the legislation and it is likely that there will be a recommendation to combine the two systems.

In 1997 both pieces of legislation were amended with a view to improving the ability of Canadian Courts to work with courts of other jurisdictions in multi-national cases and to coordinate administrations for the benefit of stakeholders involved in those cases. Canada has been involved in a large number of major cross-border insolvencies, largely due to the fact that most major Canadian businesses also operate in the US. David Ward reported on the recent initiatives concerning the insolvency of the Loewen Group, which was the second largest funeral services company in North America at the time of its recent collapse. It went into insolvency under the CCAA in Toronto and also entered into Chapter 11 administration in Delaware. A joint court hearing was held on 27 March 2000 between the Ontario Superior Court of Justice in Toronto and the US Bankruptcy Court for the District of Delaware in Wilmington. The joint hearing was held by way of "live" televised proceedings with all parties making reports to both Courts. Each Judge was able to ask questions of Counsel in the other jurisdiction. As a result, the Courts were able to agree upon a co-ordinated approach to the litigation, resulting in a substantial saving of expenses and time.

Singapore

Sarjit Singh Gill pointed out that if a foreign company is being wound up and a local liquidator is appointed in Singapore to deal with the local assets, the local liquidator can only pay the net amount recovered to the foreign liquidator after paying off all debts and liabilities of the foreign company which were incurred in Singapore. In other words, assets based in Singapore are used to give priority to Singaporean creditors, rather than those assets being returned to the foreign liquidator and the Singaporean creditor ranking equally with the creditors from other jurisdictions.

New Zealand

Jennifer Sutton reported on the progress of the New Zealand Law Reform Commission, which had recently produced a report "Priority Debts in the Distribution of Insolvent Estates" which dealt with the difficult issue of preferential debts for employees in an insolvency. The Commission concluded that compelling reasons exist to justify priority for wages to employees. The Ministry for Economic Development has provisionally recommended that employee preference should be retained, but directors should be excluded from the employee priority. Hopefully the Law Reform Commission will address the lack of legislation in New Zealand to enable a effective and efficient rehabilitation scheme for insolvent companies.

Korea

Yon Kyun Oh noted that the insolvency legislation in Korea had recently been changed to speed up the reorganization and turnaround procedures. Under the new rules the Insolvency Court will decide within one month as to whether a reorganization should be commenced.

Australia

This writer reported on a number of recent high profile insolvency administrations in Australia in which employees have faced the prospect of losing significant amounts of their accrued entitlements. The political pressure resulting from the media coverage of the plight of these employees caused the Government to introduce new legislation in 2000 to try and address the problem. The Corporations Law Amendment (Employee Entitlements) Act 2000 came into force on 30 June 2000. It provides that a person must not enter into an agreement or transaction (including the structuring the affairs of a corporate group) with the intention of preventing or significantly reducing the recovery entitlements of employees of a company. Any person who breaches that provision will be personally liable to pay compensation. The liquidator of the company will be able to sue on behalf of the employee, but it is considered that this legislation will not be of great significance in practise because it will be difficult to prove the necessary intent.

This writer also reported that the Government had announced the Employee Entitlement Support Scheme under which the Government will fund up to a maximum of 29 weeks pay for unpaid employee entitlements, and the Government will then be entitled to stand in the shoes of the employees as creditors of the administration.

This writer reported on the continued use of provisional liquidations in some major insolvencies, particularly the recent insolvencies in HIH and Gideon Investments. Even though the system of voluntary administration in Australia is widely used, there are still situations in which a "quick fix" for an insolvent company is not feasible, and the old system of provisional liquidation followed by a formal winding up needs to be pursued.

This writer also reported on some issues which have arisen in the voluntary administration procedure in Australia, arising from the fact that the directors of the debtor company appoint the administrator, and if the administrator cannot successfully promote a Deed of Company Arrangement which is accepted by the creditors, the company is wound up and the administrator is automatically appointed the liquidator of the company. One of the most significant tasks of a liquidator is to investigate the conduct of the directors, but a conflict of interest arises when the insolvency practitioner is appointed by those directors. Obviously directors will be inclined to appoint an administrator who has a reputation for not being as aggressive in the pursuit of directors as other insolvency practitioners might be.

Indonesia

Finally, this writer reported upon two extraordinary and disappointing decisions of the courts in Indonesia insolvency matters. In one case the liquidator appointed by the court was arrested by the police without formal charges, and the underlying legal dispute was simply not being heard by the courts. In the second case, the presiding Judge twice adjourned a case at the point where creditors were to vote on a Plan of Composition, and subsequently he allowed a

revised debt restructuring plan put forward by new creditors which had emerged very late in the liquidation, those creditors claiming to have put US$160 million into the bankrupt company and to have immediately withdrawn the funds. The address of one of the creditors was a small chicken noodle shop in North Jakarta, the owner of which claimed to not know anyone involved with the consortium. The IFC appealed against the decision but in March 2001 the Indonesian Court upheld the decision of the lower court, much to the distress of the IFC.

The 12th Annual Conference of the IPBA will be held in Hong Kong in May 2002. Once again Arnold Quittner has organized a very strong panel. Anyone who is interested in insolvency in Asia and the Pacific is strongly urged to attend.

Geoff Sutherland
Coudert Brothers
Sydney, Australia

Announcement by the Legal Development and Training Committee

The IPBA Council encourages members who are visiting another jurisdiction to take time to make a brief presentation on their area of expertise to lawyers in the host jurisdiction. For instance, a member from India visiting California could brief California lawyers on new developments in laws affecting foreign investment in India. Or a member from Japan visiting Hong Kong could meet with Hong Kong lawyers to discuss developments in the regulation of the financial sector in Japan.

A member who is visiting another jurisdiction who would be willing to make a presentation should contact the Jurisdictional Council Member as far in advance as possible to discuss possible topics. Presentations could take place at breakfast or lunch meetings or at any time the Jurisdictional Council Member thinks would be appropriate.

The Council encourages presentations by visiting lawyers because they will help carry out several of the purposes of the IPBA, namely to foster and facilitate the exchange of information and networking opportunities in the region. These presentations could also be a vehicle for introducing the IPBA to potential new members and to young lawyers in a jurisdiction.

The Council took its action at the recommendation of the IPBA's Legal Development and Training Committee. The Council established the Committee for the purpose of coordinating and initiating the IPBA's efforts to provide training to lawyers in the Asia-Pacific region and to support the development of legal institutions in the region. Among the specific tasks of the Committee are:

- Research and evaluate regional training programs and determine what gaps could be filled by the IPBA.

- Evaluate the current opportunities for training of lawyers provided by the IPBA and encourage additional opportunities.

- Monitor legal development projects taking place in the region and provide information on those projects to IPBA members.

- Carry out a study and report to the IPBA Council on ways in which the IPBA and its members could become involved in legal development projects and programs.

- Explore and pursue the establishment of an Asian Institute for Advanced Legal Studies.

The Council has also approved several other recommendations of the Committee.

First, the Committee recommended that a two- to four-day continuing legal education program, focusing on one topic in depth, be organized for lawyers in the host jurisdiction in conjunction with each annual meeting and conference, beginning with the Hong Kong Conference in May 2002. The length of the program, the topic and the target audience (for example, experienced practitioners or young lawyers) would be determined for each conference in cooperation with members in the host jurisdiction. These continuing legal education programs will be able to take advantage of the presence of experienced practitioners who are attending the annual conference.

Second, the Committee recommended that a half or one-day program for local lawyers be organized in conjunction with the mid-year council meeting each year. This had been done in the past at the 1995 and 1996 mid-year council meetings. Again, the length of the program, the topic and the target audience will be determined in consultation with members from the host jurisdiction.

Finally, the Committee recommended that the host committee for each annual meeting and conference organize a one-day program for the M.S. Lin Scholars selected for the conference on the day prior to the start of the conference. The program would introduce the Scholars to the basic legal system and the practise of law in the host jurisdiction.

The members of the Legal Development and Training Committee are Rodney Gates, Terri Mottershead, Arnold Quittner, Sang-Kyu Rhi, Anongporn Thanachaiary, Dej-Udom Krairit (co-chair) and Carl Anduri (co-chair). Your suggestions and contributions to the Committee's work would be gratefully received at any time by the co-chairs (e-mail: dejudom@loxinfo.co and canduri@lexmundi.org).

New Initiatives to Resolve Corporate Debt Problems in Malaysia

Recent initiatives and guidelines indicate that the Corporate Debt Restructuring Committee of Malaysia will take a robust approach towards the resolution of corporate debt problems in the country

Kok Chee Kheong
Skrine & Co
Kuala Lumpur, Malaysia
kck@skrineco.com

In early August 2001 the Government of Malaysia announced changes to the Corporate Debt Restructuring Committee ("CDRC"). These changes represent the Government's further initiatives to resolve corporate debts which amounted to approximately RM29.0 billion as at 31 July 2001 (based on a CDRC Press Release dated 9 August 2001).

First, the Government announced changes to several key personnel in the CDRC with effect from 1 August 2001. This was followed by an announcement on 9 August 2001 by Datuk Azman Yahya, new Executive Chairman of the CDRC, of three new initiatives by the CDRC, namely:

- Expansion of the membership of the CDRC to include representatives of Pengurusan Danaharta Nasional Berhad ("Danaharta"), the national asset management company, and the Federation of Public Listed Companies;
- Introduction of changes to the framework and approach of the CDRC; and
- Regular disclosure and quarterly up-dates by the CDRC to keep the financial market informed of the progress of its restructuring efforts.

This article seeks to examine the new framework and approach adopted by the CDRC to tackle the corporate debt problems in Malaysia.

Background

The CDRC was set up by Bank Negara Malaysia ("BNM"), the Central Bank of Malaysia, in July 1998 in the wake of the Asian Financial Crisis, to facilitate the restructuring of large corporate debts. It sought to provide a platform for borrowers and creditors to work out feasible debt restructuring schemes, with the CDRC playing the role of advisor and mediator between the parties concerned. The initiatives taken by the CDRC are wholly informal and not supported by legislative framework.

New Criteria for Acceptance

Under the old regime, a borrower could apply to the CDRC for assistance if it had total bank borrowings of RM50.0 million or more and such amount was owed to more than one bank. Under the new initiatives, the minimum borrowings of the borrower and its group have been increased to RM100.0 million and such sums must be owed to at least five creditor banks.

It is a prerequisite under both regimes that the borrower's business must be viable.

An additional criterion announced by the CDRC is the requirement that the borrower must have sufficient cash generated to cover its operating expenditure (before interest, taxation, depreciation and amortization).

Although the old guidelines suggested that creditors were not precluded from submitting cases to the CDRC, the new guidelines state clearly that bank creditors to whom at least 25% of the total indebtedness is owed may submit a

case to the CDRC.

Creditors Steering Committee

Constitution

The old guidelines provided for the establishment of a Creditors Committee as part of the workout process, but did not set out the composition of the Committee, save that its members must represent at least 75% of the total debt owing to creditors which were financial institutions.

The constitution of the Creditors Steering Committee ("CSC"), the equivalent of the Creditors Committee under the previous regime, is set out with greater clarity under the new initiatives. The CSC may comprise up to seven members, including a senior representative of the CDRC who is to be the Chairman. The other members include the largest secured creditor, the largest unsecured creditor, a representative of the smaller secured creditors, a representative of the smaller unsecured creditors and, where appropriate, the agent bank and a representative of the non-bank creditors.

The members of the CSC should represent creditors who in aggregate hold more than 50% of the total indebtedness owing by the borrower. The guidelines attempt to clarify the meaning of "smaller creditors" in that it states that representation the small creditors shall constitute the lower 50% of creditors in value terms.

To emphasize the seriousness of its efforts, the CDRC has stipulated that:

- one of the two representatives of each creditor bank on the CSC must be its head of recovery or equivalent;
- failure to attend two meetings will result in termination of membership; and
- absenteeism will be reported to BNM.

It is laudable that the new guidelines attempt to ensure a balanced representation of creditors both in terms of the value of debts owing and the class of creditors. However, the guidelines do not clarify the circumstances under which it would be appropriate to include a member which is a non-bank creditor in the CSC and, more importantly, the manner in which such member would be selected, given that the non-bank creditors comprise a diverse group of creditors such as trade creditors and service providers.

Role

The role of the CSC is to coordinate, formulate and manage the implementation of an acceptable workout. Its primary functions include:

- convening of meetings at regular intervals to review progress and determine follow-up action;
- negotiating with borrowers in evaluating and determining appropriate workout;
- liaising with consultants on the acceptability or otherwise of their proposals; and
- assisting in liaising with and obtaining approvals from relevant regulatory authorities.

Schedule for Restructuring Schemes

Under the old regime, no time limits were imposed by the CDRC on the implementation of a restructuring carried out under its auspices. Hence the pace at which such schemes were carried out depended largely on the parties involved. Furthermore, owing to the absence of legislative force, full consensus had to be obtained to proceed.

In an attempt to overcome these perceived stumbling blocks, the CDRC has as part of its new initiatives announced aggressive deadlines within which pre-determined "milestones" are to be achieved. These are as follows:

Within one month of receipt by the CDRC of application:

- The CDRC will evaluate the proposal;
- If the proposal is accepted by the CDRC, a CSC will be established;
- An interim standstill agreement ("Standstill Agreement") will be executed.

Within three months thereafter:

- Scheme advisors and solicitors will be appointed;
- Draft scheme will be formulated;
- Informal discussion will be held with regulatory authorities;
- The scheme will be adopted by the CSC and approved by the creditors.

Thereafter (envisaged to be within six to nine months):

- Definitive agreements will be executed;
- Mode and timeline for implementation will be determined;
- Scheme will be submitted to regulatory authorities;
- Scheme will be implemented;
- Case will be discharged from the CDRC.

The early involvement of professional

advisors will serve to ensure that all aspects of the restructuring scheme are addressed from the outset. The consultative approach with regulators will assist in ensuring that the scheme meets the criteria set by the regulators and minimizing delays which may otherwise arise from modifying the scheme to comply with conditions imposed by the authorities in approving the scheme.

The CDRC has announced that a Standstill Agreement executed by a majority in value of creditors will be binding on all creditors, and the requisite majority required for approving a restructuring scheme is a majority in number of creditors representing at least 75% of the amount owing to the creditors present and voting. It is obvious that in the absence of legislative framework the legality of the foregoing provisions may be challenged. It remains to be seen whether disgruntled financial institutions which carry on business in Malaysia would be prepared to seek judicial recourse, given that the CDRC is part of the central bank of Malaysia. Furthermore, would disgruntled foreign lenders be more prepared to challenge such decisions in the courts?

From a broader perspective, it would still be possible to implement a workout which does not receive full consensus from creditors through schemes of arrangement under Section 176 of the Companies Act or, in appropriate cases, by means of a proposal prepared by a Special Administrator ("SA") appointed under the Pengurusan Danaharta Nasional Berhad Act, 1998 ("Danaharta Act") (see below).

Additional pressure is placed on creditors to adopt a pragmatic approach in evaluating a restructuring scheme as rejections are required to be accompanied by valid reasons and proposed amendments.

Guiding Principles

The CDRC has laid down guiding principles for workouts which are to be carried out henceforth under its auspices. These guidelines can broadly be classified into three categories, and the main principles governing each category are summarized below:

General Principles

- Limitation of creditors' claims to levels existing as at the date of the Standstill Agreement
- Preservation of existing securities
- Preservation of borrower's cash flow
- Recognition of lenders' priority of rights
- No acceleration of demand for repayment
- Where operating accounts are maintained, creditor banks will not be permitted to exercise rights of set-off
- New monies (approved by the CSC) to have priority of exit under workout
- Total recovery should correlate to the net aggregate value of borrower's tangible and intangible assets
- Shareholders to take bigger haircut than creditors
- Financial and operational restructuring must ensure viability and going concern status of borrower

Guiding Principles for Financial Restructuring

- Debt to be restructured into equity, quasi-equity and pure debt
- Common rate of interest for similar classes of creditors
- Differential in rate of interest between classes of creditors limited to a maximum of 1% p.a.
- Waiver of all penalty interest
- Periodic servicing of interest
- Designated usage of funds
- Sharing in surplus from disposal of unencumbered assets
- Incorporation of financial covenants
- Claw-back of all concessions in the event of failure

Guiding Principles for Operational Restructuring

- Changes in management, board of directors and shareholders, where appropriate
- Disclosure of related party transactions
- Divestment and/or liquidation of non-viable and non-core assets
- Sale of assets to be agreed by the CSC and should reflect prevailing market values
- Appointment of monitoring accountant and conduct of special audits
- Regular reporting to creditors
- Establishment of operational covenants

The guidelines introduced by the CDRC represent an interesting attempt to balance countervailing interests between the borrower and the creditors as well as between the creditors interse.

The preservation of the borrower's cash flow, priority of exit given to new money, waiver of

penalty interest, limitation of claims to those existing as at the date of the Standstill Agreement and the ouster of the right of set-off for operating accounts, will assist the borrower in formulating a more viable restructuring scheme. On the other hand, the imposition of financial and operational covenants, restriction on the usage of funds, appointment of monitoring accountants, conduct of special audits and requirement for regular reporting and the claw-back of concessions in the event of a failure of the restructuring (which presumably includes failure arising from default by the borrower) will serve to ensure that the borrower complies with its obligations under the workout.

The common rate of interest for similar classes of creditors and of a maximum differential of 1% p.a. in interest between classes of creditors and the requirement for sharing of all surplus from the disposal of unencumbered assets, are imposed in an attempt to balance the interest of creditors inter se.

The requirement for periodic servicing of interest will undoubtedly be welcomed by financial institution creditors. For this to be feasible, the need to preserve the borrower's cash flow assumes even greater significance.

The requirement that shareholders take a larger haircut than the creditors and the right, in appropriate cases, to change the shareholders, directors and management of the borrower, is a tacit recognition by the CDRC that the parties which are primarily responsible for creating the debt problem should make the most sacrifices in its resolution.

Although not specifically mentioned in the guidelines, the Chairman of the CDRC has suggested that under the new regime, creditors are expected to take a greater haircut than those in the cases resolved through the CDRC previously (see *New Straits Times* (Business Section) 10 August 2001, *The Star* (Business Section) 10 August 2001 and *The Edge*, 13 August 2001).

The Damoclean Sword

In the absence of a legislative framework, some doubts have been expressed as to the means by which the CDRC will be able to give effect to its new framework and approach.

Bearing in mind that the CDRC is established by BNM, which regulates financial institutions in Malaysia, creditors which are financial institutions may endeavour to be more accommodating in CDRC restructurings. Recalcitrant borrowers run the risk of having their cases thrown out by the CDRC.

In cases where the borrower is an "affected person" under the Danaharta Act, *i.e.* a borrower or security provider of a credit facility extended by Danaharta (or any of its subsidiaries) or is a subsidiary of such borrower or is a company where at least 2% of its share capital has been provided as security for a credit facility granted by Danaharta (or any of its subsidiaries), Danaharta may, subject to fulfilment of the conditions set out in Section 25 of the Danaharta Act, upon its own volition or the application of the board of directors or majority of the shareholders of an affected person, apply to the Oversight Committee to appoint an SA over the affected person.

An SA shall upon its appointment assume control of all assets of an affected person and shall manage such assets and the affairs of an affected person. The SA is required under the Danaharta Act to prepare and submit a proposal which sets forth the SA's plan for the affected person. If the SA's proposal is approved by Danaharta, the same will be implemented if the affected person has no secured creditors. Where an affected person has secured creditors, the SA's proposal may only be implemented if it is also approved by a majority in value of the secured creditors present and voting at a meeting of the secured creditors.

The appointment of an SA will take the control of debt resolution out of the hands of the creditors and the borrower, and this may, in the final analysis, be the Damoclean Sword wielded by the CDRC to achieve its desired objectives.

Conclusion

The guidelines laid down by the CDRC are welcomed as they set out clearly, for the benefit of all parties concerned, the factors to be considered in debt restructurings carried out under its auspices. Early involvement of professional advisors and the adoption of consultative process with the regulatory authorities will help ensure that the restructuring scheme put forward to the creditors meets all legal and regulatory requirements and incorporates the feedback received from the authorities.

The robust approach taken by the CDRC, with the various aggressive deadlines, increases the pressure on all parties involved, in particular financial institutions (which in Malaysia are not known to have the most nimble decision-making process) to react faster to debt resolution.

Under the new regime, it is likely that financial institution creditors will have to take greater haircuts to assist the Malaysian Government in achieving its objective of resolving the corporate debt overhang from the last recession within the next two to three years.

Internet Service Providers in India: A Perspective

With the growth of Internet services, the potential liability of service providers in India has become a matter for concern

Rodney D. Ryder
Amitabha Sen & Co.
New Delhi, India
asenco@vsnl.com

Introduction

The directive by the Government of India to permit operation of Internet services by private Internet Service Providers (ISPs) in India has generated a lot of interest throughout the country. (In this context the term "directive" refers only to the directions which the Ministry of Telecommunications can issue pursuant to the powers conferred on it. These directives are the subject of delegated legislation.) In this light, this article aims to bring the legal aspects of ISP privatisation into perspective. On the one hand, certain misconceptions and fallacies will be explained; on the other hand, sectors of opportunity and feasible strategies will be mentioned. It should be noted that this article is not intended to be a comprehensive legal treatise, only an introduction to the subject.

The Internet in India: A Brief History

Internet access, in a sense, sprang up in India in the early 1990's. The Educational and Research Network (ERNet), a division of the Department of Electronics (DoE), and NICNet (the Department of Statistics) made the initial inroads in this field. Both ERNet and NICNet were Government projects, but with very different charters and growth histories.

The ERNet project was designed to provide Internet connectivity to the premier educational and research institutions in India, while NICNet was assigned the task of providing Internet services primarily to Government departments and organizations. Under the guidance of its Director Dr. S. Ramakrishnan, ERNet grew from a low-bandwidth, unreliable, shell1 and UUCP2 based Internet service to become the first to provide full TCP-IP3 access to dial-up modem4 customers through SLIP5 accounts in around 1993. This was followed by an upgrade to a nation-wide V-SAT6 network and passable high-reliability services by 1996. The shaky technical skills of the network management group at ERNet Delhi have perhaps been its weakest point.

NICNet was designed to provide V-SAT and dial-up Internet access primarily to Government departments. It began with shell-only access at 2400 BPS, but now provides high speed TCP-IP access through 64 KBPS V-SAT links. Technologies have also been upgraded to follow current trends, under the guidance of Dr. Sheshagri, Director. NICNet may not quite match world ISP standards, but it is not too far behind.

ERNet and NICNet were therefore the first ISPs in India, although their operations had been shackled by the restrictions imposed by Government regulations and policies of the Department of Telecom (DoT). Despite this, they had done quite well in providing the essential Internet services to an Internet-starved India, until the advent of VSNL Internet services and the restrictive clampdown that followed.

Another provider of Internet services that preceded VSNL was the Software Technology Parks of India (STPI) Internet service. Again, this service was permitted only for a restricted audience – the software exporters falling under

the STP scheme of the DoE. STPI has been providing high-end Internet services through leased lines and dial-up links, in and around several of the Parks, including Bangalore, Hyderabad and NOIDA, through the respective SoftNET networks. Of these, the NOIDA network is perhaps the most ambitious, technologically sophisticated, and also the most complex ISP in India. This network, entitled the National Capital Region IP Network (NCR-IP7), reaches software exporters in and around New Delhi, Gurgaon, and NOIDA. Connectivity is provided via CDMA and TDMA radio networks, Ethernet LANs and dial-up lines. Currently, dial-up access is only available to the STPN network administrators due to VSNL-imposed restrictions.

VSNL: The Early Days

On 15 August 1995, VSNL launched the Gateway Internet Access Service (GIAS) for providing public Internet access. Initially, the DoT allowed VSNL the license to operate this service only in the four metros. By its charter, VSNL could only provide international telecom gateways, not end-user services. Thus the name "Gateway Service" was used for covering up direct service provision.

Starting with only dial-up shell and PPP8 access in the four metros, VSNL then proceeded to provide leased-line access to subscribers, and expanded its sphere of operation by setting up points of presence (POP) in Bangalore and Pune. The DoT turned a blind eye to these license violations, and even tacitly helped VSNL with *ex post facto* and *ad hoc* permissions along the way.

VSNL has, since the inception of GIAS, portrayed itself in the press and public as the only legitimate ISP in India, while imposing many restrictions on the other ISPs through DoT regulations and the telecom policies. The Telegraph Act of 1885, a pre-independence British law, has been repeatedly invoked by VSNL and interpreted in such a way as to confer extended powers on VSNL while forcing the other ISPs to curtail their operations.

Liability of ISPs for Third Party Content

It is essential for the growth of a national information infrastructure that the exposure of network service providers (NSPs) to the risks and liabilities of third party content be limited. For example, an ISP should not be held liable for objectionable content or defamatory statements on the thousands of web sites which are accessed daily and over which the ISP has no control. The Indian Information Technology Act, 2000 (the "Act") makes a clear distinction between an access provider who provides access and a content provider who provides the content. Section 79 of the Act provides that NSPs are not to be held liable in certain circumstances.

Under the Act an NSP is not subject to criminal or civil liability for third party material for which or to which the NSP merely offers access. Where NSPs engage in activities which are indistinguishable from those of common carriers such as telephone companies and post offices, they should be given the assurance that they will be treated in the same way in respect of such activities. It will not, however, affect any obligation founded on contract or any obligation imposed under any written law, or any directives by a court to remove, block or deny access to any material. NPSs will, of course, continue to be liable for their own content or for any third party content that they adopt or approve of.

Enforcement

There would plainly be little point in adopting an exclusively national approach to unlawful acts on the Internet. In addition to taking on an international approach, we have to decide who is in fact liable for unlawful acts on the Internet. Should it be the sender of the information, the service provider, the user or all of them? The access providers, in general, claim that they are nothing more than a messenger. Their role should not be compared to that of (say) a publisher, but resembles the role played by telephone companies, which connect callers or inter-connect fax and data transmissions. In the case of *Church of Scientology v. XS4ALL* (12 March 1996, published in Mediaforum 1996 - 4B59), the President of the District Court of the Hague held that information providers do nothing more than offer an opportunity to publish and that, in principle, they are unable to exercise any influence on, or even be aware of, what people say or are able to say on the Internet. It follows that there is, in principle, no reason to hold service providers liable for unlawful acts committed by Internet users. However, a service provider may be held liable where it is unmistakably clear that a publication by a user is unlawful and where it may be assumed in all reasonableness that this has been known to the service provider or, *a fortiori*, when the service provider has been informed of this. In such a situation, it may well be possible that the service provider could be required to take action against the user in question for an indemnity.

Since it is not possible for the service provider to screen all material before it is made available on the web site, it would seem unacceptable for the service provider to be solely liable. Even if he were to monitor constantly all the sites on his server, the provider could never be able to prevent an infringement and could consequently never avoid liability. Furthermore, such liability would lead to an undesirable form of censorship by and against the service provider.

On the other hand, the service provider is the only entity or person, apart from the information provider himself, who can stop the infringement by closing the web site. It would seem to place an unacceptably heavy burden on the holder of the right to have to prove an infringement in the court where the service provider would be obliged to reveal the identity of the anonymous information provider and close the site.

In order to avoid both censorship by service providers and avoid saddling them with an unduly onerous liability, everything possible should be done to trace the source of the information. The source and not the service provider should be primarily liable for the content. However, it is considered reasonable to hold the service provider liable in certain cases and to obligate him in those cases to close the home page and, upon request, to disclose the identity of the owner of the anonymous home page.

Quite apart from the legal instruments, there are also, of course, technical means of barring undesirable information from the Internet, namely electronic blockades. Users of electronic communication media can block the use of certain services or the consultation of certain material by electronic means. In the United States, for example, commercial on-line services such as America On Line and CompuServe provide parents with the technological means to deny their children access to certain information.

Understanding Intermediary Liability

New information technologies have stimulated a rethinking of the legal rules according to which information intermediaries are held legally responsible for harmful information created by someone else. Such liability might be imposed for defamation or copyright infringement, or for distribution of contraband such as child pornography. Intermediaries might also face liability for false advertising or fraudulent misrepresentation by facilitating the distribution of false or fraudulent material originated by someone else, although no cases on this issue have yet arisen in the United States. Similarly, intermediaries might face liability for invasion of privacy if they facilitate intrusion into someone else's private information space or facilitate the publication of private information about someone else. Moreover, under present and proposed criminal statutes, they might be liable for distributing child pornography (see *United States v. N Citement Video* 115 S. Ct. 464 (1994)) or other indecent material.

With transactions taking place in an open network environment, questions are constantly raised as to the liabilities of the carriers of these transactions, should disputes or problems arise. In the physical world, intermediaries such as publishers are accountable for the content published by authors. However, in the electronic world, there are some classes of intermediaries (such as ISPs) who carry the data but do not exercise direct control over the content (similar to that of telephone operators, although arguably they still exercise some level of control). In the spirit of promoting electronic transactions, it is important to clarify and, where appropriate, limit the liabilities of such intermediaries. It is proposed that intermediaries who are NSPs are not responsible for third party content to which they merely provide access. On the other hand, it is necessary to ensure that providers do not shirk their responsibilities under the licensing scheme to regulate undesirable content. The Act will, therefore, make it clear that ISPs are not absolved from their licensing obligations. The Ministry of Telecommunications has issued "Guidelines for Internet Service Providers" containing technical and regulatory compliance standards which are mandatory for the ISPs. These are, in a basic sense, the terms and conditions for obtaining a license.

Legal Approaches to Intermediary Liability

If any of these systems is to function anywhere close to its potential, as a mechanism for disseminating information, the intermediaries must not be inhibited from performing their dissemination function for fear of vicarious liability for the wrongdoing of others. Such inhibition might arise because of the existing copyright laws. An intermediary may disseminate an infringing work and commit literal infringement because of the architecture of its system. Literal infringement would occur either because the intermediary permits posting of copies on the intermediary's computer by third parties, or its caching algorithm makes an intermediate copy to improve system

performance, or establishes pointers executable by the user which violate the distribution, display or performance rights exclusively reserved to the copyright holder. What happens here is not that the intermediary accesses the copyright holder's material without permission, but that the intermediary unwittingly aids in the dissemination of an infringement perpetrated by someone else.

The nature of the increasingly complex intermediation technologies does not make it feasible for intermediaries to check out the bona fides of the information they assist in disseminating. It may well be feasible for a service provider who actually maintains copies of files and messages on its own computer to screen for certain offensive words, but it is certainly not feasible to automatically screen for copyright or trademark infringement, especially by one who merely points to information resources created and maintained by others. Any attempt at such screening would so clog up the functions of the dissemination technologies that their power would largely dissipate.

Impact of Different Architectures

The National Information Infrastructure of the future will be more diverse, more multi-directional, more decentralised, more distributed, and less proprietary in important respects than today's converging but still separate telephone, broadcast, cable, and computer database markets. In other words, the infrastructure will have important features of today's Internet. In that kind of infrastructure, intermediaries will play an even more important role than interexchange networks do in today's telephone system, local broadcast stations in today's network television, local cable franchises in today's cable television system, and libraries, news-stands and bookstores in today's printed material distribution chain. Already, small and large bulletin board operators are making it possible for individual citizens and small companies to exchange e-mails with each other and engage in electronic discussions by posting messages. Larger information services enterprises like America On Line, CompuServe and Prodigy allow similar information brokering functions.

Diverse technological approaches to intermediation enlarge the possibilities of relationship between a particular intermediary and the content received by a particular consumer, and between a particular intermediary and that consumer. The Internet and similar architectures permit value-added products to be unbundled, with different elements of the bundle being supplied by different entities, and the bundling of these elements occurring according to the desire of a particular user at the time the user wants the complete value-added information product. In this architecture, suppliers of information supply their content to anyone who wants it simply by putting files on computers connected to the Internet, called servers or "content servers".

It is entirely possible with Internet applications like the World Wide Web for an entity to supply only index or table of contents type value in the form of pointers to content. The pointers are implemented through World Wide Web pages and lists or Gopher menus on an Internet server that offers no other kinds of value. Someone else can provide user-friendly interface software through another server. Still someone else can provide connection services that permit connections through dial-up telephone lines or high speed dedicated links.

When a user wishes to identify and obtain a particular type of content, the user interacts with several Internet servers operated by different entities. First, the user establishes a connection to the Internet through a connection services provider, who then establishes a connection with an index provider. From the lists, tables, and menus provided by that server, the user identifies one or more items of interest. The index server uploads the pointers (not the content because the index server does not have the content) through the Internet to the user's client computer. Then the client computer executes the pointers, which automatically causes the pointed-to content to be downloaded directly from the content server to the client computer.

This is a kind of assembly line for pieces of information value. It produces a product just in time rather than producing it in bulk according to someone else's design, just in case someone might want that particular bundle. It lets the user design the product on an *ad hoc* basis. Such an infrastructure is not only two layered; in many cases a pointer points, not directly to the full information resource, but to another collection of pointers, which may point to still other collections of pointers and so on, collectively marking a trail to the complete resource. The computer programs involved assemble a trail from the pointers and then retrieve the desired content directly from wherever it resides to the computer of the requester, without the content having to traverse all the intermediary computers. Whether an intermediary points

directly or indirectly to the desired resource is inherently an engineering decision driven by performance considerations. In many cases, the decision to maintain copies of a particular information resource is made entirely automatically without any human intervention. A clear example of this is the caching of recently retrieved resources within a World Wide Web browser such as Netscape.

In the typical bulletin board/electronic publisher setting, the server not only provides pointers and other finding and retrieval value, represented by the rectangles; it also publishes content, represented by circles. The client has dealings only with the server, which looks like a conventional publisher.

The Thai Asset Management Corporation

The government of Thailand has recently established the Thai Asset Management Corporation with a view to increasing the stability of the country's financial sector

Punjaporn Kosolkitiwong
Dej-Udom & Associates Ltd
Thailand

The economies of many countries around the world – including Thailand – have not yet recovered from the economic difficulties that began in the late 1990s. As a result there are a great many debtors who have been unable to repay their debts to creditors, such debts become non-performing loans (or NPLs).

In February 2001 the new Thai government introduced the Thai Asset Management Corporation (TAMC) policy as a way to increase stability of the financial sector, allow for more efficient management of NPL assets, minimize economic losses and promote corporate restructuring.

On 5 June 2001, the Cabinet passed the Thai Asset Management Corporation Decree (the "Decree"). The purpose of the Decree was to hasten the clean-up of financial institutions' NPLs which are crippling the nation's economic recovery. This decree has been in effect since 9 June 2001.

The essential features of the TAMC are as follows:

Types of Financial Institutions that may Transfer NPLs to the TAMC

There are two types of financial institutions that may transfer NPLs to the TAMC. First are those financial institutions which belong to the state, or a financial institution where more than 50% of its shares are held by the state or state enterprises (hereinafter referred to as "group one institutions"). Such financial institutions are Bangkok Metropolitan Bank, Siam City Bank, Bank Thai, Krungthai Bank, Sukhumvit Asset Management and Bangkok Asset Management. The total book value of these NPLs is estimated to be Baht 1.1 trillion.

NPLs as of 31 December 2000 of group one institutions must be transferred to the TAMC.

The second type of financial institutions that may transfer NPLs to the TAMC are those that belong to the private sector (hereinafter referred to as "group two institutions"). NPLs as of 31 December 2000 of this group of institutions may be transferred to the TAMC. The financial institutions included within this group are:

- Commercial banks under the Commercial Bank Act, but not the branches of foreign banks.
- Finance companies and credit foncier companies under the law concerning finance, security and credit foncier, including finance companies which conduct securities business.
- Any juristic entity as set out by the Ministry and announced in the government gazette.

Criteria for Accepting a Transfer

The following criteria are to be used by the TAMC when considering whether to accept a transfer from a group one institution:

- NPLs as of 31 December 2000;
- NPLs which are pending in court;
- NPLs where the court has not yet placed a temporary or absolute receivership order against the debtor; and

- NPL plans which the Bankruptcy Court has yet to approve.

NPLs that must be transferred to the TAMC also include those where the state is the major shareholder of a debtor, holding shares exceeding 50%. If the management of the debtor or other person admits the debt is for the benefit of the debtor or such other juristic entity, or if it was incurred to repay other debt or interest of the debtor or such other juristic entity, the debt will be considered an NPL that must be transferred to the TAMC.

NPLs under the law are grouped into four classifications as follows:

(a) NPLs classified as loss;

(b) NPLs classified as doubted loss;

(c) NPLs classified as doubtful; and

(d) NPLs classified as under standard.

The TAMC may consider whether to reject an NPL under class (c) and (d), or whether to accept part of it by considering whether it will exceed the capacity of either the institution or the TAMC if such debt becomes an NPL.

The following are the criteria that the TAMC may use when considering whether to accept a transfer from a group two institution:

- NPLs as of 31 December 2000 that are secured debt;
- NPLs of a debtor who is a juristic entity and has more than two creditors which are financial institutions or asset management companies, whether or not there is a personal guarantor for the NPL;
- The value of each NPL according to the accounting records of each financial institution and asset management company exceeds Baht five million; and
- NPLs that have entered into a Debt Restructured Agreement within 30 days from the date the decree came into effect, but not NPLs where the Bankruptcy Court has approved the plan prior to the effective date of the decree.

After a group two institution informs the TAMC of its intention to transfer a NPL to it, such intention cannot be withdrawn.

Result of Transferring an NPL to the TAMC

According to the law, the transfer of NPLs to the TAMC shall not revoke any liability for wrongdoing committed by the management of the institutions or asset management corporation (AMC) prior to the date of the transfer.

If a debtor of a financial institution or AMC finds that its debts meet the criteria for transfer, but the debt is not accepted by the TAMC, such debtor is entitled to file a pleading with the committee to consider ordering the said institution or AMC to transfer such NPL to the TAMC within the prescribed period.

If the institution or AMC fails to transfer such NPL to the TAMC within the prescribed period, such institution or AMC will be required to pay compensation of Baht 500,000 per day to the TAMC, which shall use such compensation to reduce the outstanding debt of the debtor in question.

If the TAMC finds that any NPL was incurred because of fault or a failure to perform duties under the law concerning commercial banks, the finance business, security business or credit foncier business, the TAMC shall notify the Bank of Thailand (BOT) to commence investigation and other and/or further proceedings against the relevant institution or AMC.

The claims, rights or burden under the transferred NPLs shall be transferred to the TAMC. The financial institutions must provide the TAMC with all information concerning the said claims, rights, or burdens.

After the transfer of NPLs to the TAMC, all pending cases filed by the financial institutions whose NPLs are already transferred to the TAMC shall be dismissed by the court unless otherwise requested by the TAMC or unless the court has already placed the debtor under temporary or absolute receivership or has already approved the plan.

If NPLs have been transferred to the TAMC by state owned banks or financial institutions and such banks or financial institutions have filed claims against the debtors prior to such transfer, the TAMC will replace such banks or institutions and further proceed with the cases. In such a case, the TAMC has the right to object to any documentary evidence which is already submitted to the court, re-cross-examine a witness, or object to a witness that has already testified in court. If the court has already rendered its judgment in favor of such banks or financial institutions, the TAMC instead of such banks or financial institutions shall be the judgment creditor.

The debtor and the TAMC may appraise the value of the properties which are under mortgage or pledged as security of such NPLs and off-set the value from the outstanding debt

in order that the TAMC will not file a suit against the debtor. In such a case, the debtor and guarantor shall be released from any liability under the debt.

The TAMC shall be exempted from government fees or taxation in accepting the transfer of NPLs, the transfer of securities of NPLs or the transfer of properties according to the debt restructuring or business reorganization under this decree.

Result of Not Transferring an NPL to the TAMC

If the period prescribed by the TAMC has already expired without any transfer to the TAMC, the BOT shall order the financial institution that did not transfer the NPL to proceed with an appraisal of the securities of the NPL within 120 days from the expiry date.

The financial institution must reserve from the NPL account a percentage equal to the value of the NPL after deducting the value of its securities after 90 days of the expiry date of such appraisal.

The Pricing of NPLs

An NPL will be priced by adding the outstanding principal at the transfer date plus the outstanding interest not exceeding three months prior to the transfer date.

The amount which a financial institution or AMC shall pay to the TAMC for the transfer of an NPL shall be as follows:

i. If the NPL is transferred from a bank, financial institution or AMC owned by the state or state enterprises, the amount of payment shall be equal to the value of the collateral. If there is no collateral, the value shall be prescribed by the TAMC.

ii. If the NPL is transferred from a financial institution other than (i) above, the price shall be equal to the value of the collateral but must not exceed the value of the NPL as stated in the account minus the reserve required by law or the BOT.

If the collateral is land, the price shall be equal to the government appraisal value used for calculating the registration fees. If it is not land, the price shall be fixed by the TAMC.

The payment for accepting the transfer of NPLs made by the TAMC shall not be in cash but in a non-transfer note and shall not be cashed until the expiry date of ten years from the date of such note. However, the TAMC may redeem such note prior to the specified date.

Authority of the TAMC

The TAMC has authority to:

(a) restructure debt;

(b) restructure business;

(c) dispose of the debtor's assets;

(d) write off the debt.

The TAMC is also entitled to divide assets into each group and administer it by itself or with the assistance of experts.

Debt Restructuring

In restructuring debt, the TAMC is empowered to:

- decrease the amount of principal, interest, the interest rate and period for calculating interest, extend the period of repayment of debt or release the conditions of repayment of debt for debtors. If it is considered as fair and expeditious, the TAMC shall relax the conditions of repayment of debt for all debtors or for some type of debtors.
- convert debt into equity.
- accept the transfer of properties or rights to claim for repayment of debt, or partially dispose of the properties or rights to claim from the debtor by a third party. If the disposition is of the properties of the debtor which are not unsecured, the TAMC must obtain the consent from the debtor to do so.
- accept the transfer of shares, or purchase increased capital shares of the debtor for the benefit of restructuring the debtor's business.
- use any other measure with the approval of the committee.

Business Restructuring

The TAMC is empowered to restructure the debtor's business only when:

- The debtor is a juristic entity or public company or partnership, whether or not there is a guarantor for such debtor;
- The TAMC is a creditor holding more than 50% of the debtor's debt as stated in the debtor's balance sheet submitted to the Registrar;
- There is initial evidence showing that the debtor's business can be in operation, or that further operation of the debtor's business will benefit, rehabilitate or develop the economy of the country; and
- The debtor gives consent or expresses its intention in writing to restructure its business and to accept all obligations under the restructuring.

In restructuring the debtor's business, the administrative committee shall appoint any person to prepare the plan for the committee to consider and approve within the period as prescribed by the committee. The implementation period under the plan must not exceed five years from the date the plan administrator is assigned the duty from the debtor's executive. Such period may be extended for another three years by the committee.

If the debtor finds that the plan as presented to the committee is not in accordance with the purpose of the law, the debtor has a right to request the committee to order the planner to amend the plan. If the committee does not make such order and approve the plan, or if the debtor finds that the plan is not in accordance with the purpose of the law after the plan is already approved, the debtor is entitled to appeal to the administrative committee or the committee.

After the plan is approved by the committee, the TAMC must petition the Bankruptcy Court to consider the plan. Upon accepting the plan, the Court will consider the plan at an *ex parte* preliminary hearing.

In administering the plan, the TAMC is empowered to:

- amalgamate or merge the debtor's business for the benefit of the debtor's operation.
- close some business operations of the debtor.
- arrange for the other debtor's creditors who participate in the debtor's business restructuring to receive repayment.
- proceed with any other matters subject to the approval of the committee.

Automatic Stay

There is an automatic stay provision if the plan is in accordance with business restructuring and is approved by the Court. Such automatic stay shall remain valid after the plan is approved by the Court up to the successful implementation of the plan or the cessation of business restructuring. The automatic stay operates as follows:

- to temporarily dismiss a proceeding against the debtor until the implementation of the plan is expired. However, the creditor is not prohibited from filing a claim for repayment of debt with the plan administrator;
- to prohibit the termination of, or the order to terminate, the juristic entity of the debtor;
- to prohibit any official from withdrawing the operating license of the debtor or to order the debtor to cease its operations unless otherwise agreed by the TAMC;
- to prevent the debtor from being deemed insolvent, which would be the basis for filing a business rehabilitation or bankruptcy case under the Bankruptcy Law;
- to cease all enforcement against the debtor's properties whether or not such properties are used as securities. In the case where the Court has already made an order to enforce the debtor's properties, the Court shall have to cease such enforcement unless the enforcement is already completed;
- to prohibit an owner of properties used in operating the debtor's business from claiming property under a hire purchase agreement, sales agreement or any other agreement having a conditional transfer of ownership, or a lease agreement that has not yet expired, if the properties are in the possession of the debtor or other person using the debtor's rights, including the right to claim the enforcement against the properties and debt incurred from said agreements. If there is such a claim, the Court shall terminate the proceedings unless the committee considers that such properties are not essential to operating the debtor's business, and the interested person has requested that the committee proceed with the claim for the properties if appropriate;
- to prohibit the debtor from disposing of, distributing, transferring, accepting to lease, repaying or creating debt or any other actions which would create burden to such properties, except for what would be necessary for the normal operation of the debtor's business.

Futhermore:

- All temporary injunction orders of the Court whether or not to seize, attach, to prohibit the disposal, distribution, sale, transfer of debtor's properties, prior to the transfer of NPLs to the TAMC, shall be terminated by the Court or revised as per the request of the TAMC.
- No business operator of public utilities, *e.g.* electricity, water supply, or telephone, shall suspend the service supplied to the debtor.

Any action in contravention of the above prohibitions shall be void.

Disposition of Collateral

The disposition of the mortgaged or pledged collateral shall be done by a public auction or

by other means if the TAMC considers that it would be more beneficial to itself and the debtor. The TAMC can also accept the transfer of the property by paying a price not less than the price it would have received from sale at a public auction. The TAMC must announce the date of the auction on the Internet and in at least one newspaper for three consecutive days. The announcement must be done 15 days prior to the sale of the collateral. Such announcement shall be deemed to be a notice of assignment to the debtor, mortgagor, pledgee, guarantor and interested persons of such properties.

Any person with a claim on the properties to be sold must file an objection with the TAMC at least three official days prior to such sales.

Result of Disposition of Properties or Acceptance of Transfer by the TAMC of the Properties

In the case where the properties are sold or where the TAMC accepts the transfer of the properties, the results of such sale or acceptance are:

- The rights of a bona fide purchaser or the TAMC will not be void even though it can be proved that the properties do not belong to the debtor.
- No one may off-set the amount received from such sale from the outstanding debt owed by the debtor.
- No withdrawal of the sale can be made.

Penalty

An asset manager, officer, employee or any other person appointed by the TAMC to perform its duties under the Decree who asks for, receives or agrees to receive the properties or other benefits from the debtor or other persons in order to make the debtor pay less debt than it should, may be punished with imprisonment for a maximum term of 5 years as well as a maximum fine of Baht 100,000. If the wrongdoer is the juristic entity, the fine will be equal to the value of the NPL of the debtor.

Conclusion

As of May 2001 there are 187 rehabilitation cases filed with the Central Bankruptcy Court. Since the TAMC has come into effect, many creditors and debtors have been reluctant to file for business rehabilitation because they are waiting for NPLs to be transferred to the TAMC. However, since the Decree is very new to Thailand it is highly possible that the Decree will be amended so that the TAMC will be effective in helping alleviate a number of Thailand's economic problems.

The Special Economic Zone in the Canary Islands: An Overview

With the tax benefits that it entails, the Special Economic Zone that has been newly set up in the Canary Islands should prove attractive to overseas investors

Fernando Scornik Gerstein
Lao Palmas, Canary Islands
fscornic@aranzadi.es

After protracted and difficult negotiations with the EEC, the final structure of the Special Economic Zone (ZEC) in the Canary Islands comprehending two Spanish Provinces (Tenerife and Las Palmas) is now functioning within the framework of the European Community.

According to the agreement with the European Commission, the final structure of the ZEC system is as follows:

Goals:

A special tax system designed for the purpose of attracting companies and investments to the Canary Islands, which would help diversify the Canarian economy and create job opportunities.

Prerequisites for a company to be allowed into the Special Register of the ZEC and enjoy its benefits:

- minimum investment of 100.000 Euros;
- creation of 5 new jobs;
- it should undertake the activities set out in the Annex (see next page);
- it should obtain authorization of the Consortium of the ZEC to operate as a ZEC Company.

Benefits for a ZEC Company:

- reduction of companies tax from 35% (which is the Spanish tax) to a lowest of 1%, with the possibility of taking advantage of double taxation agreements;
- exemption of transfer tax and stamp duties in the incorporation of the companies and when increasing the capital (this benefit actually exists for all companies incorporated in the Canary Islands whether they are ZEC Companies or not);
- exemption of the Canarian Value Added Tax. This tax is called IGIC and the rate for non-ZEC Companies is 5%;
- exemption of other local taxes, replaced by an annual duty to be paid to the Consortium;
- these benefits shall have limits according to the size of the individual company in question;
- full support and sole control by the Consortium, which will assume all competencies in connection with the company.

Deadline:

The deadline for the above tax benefits will be 31 December 2008, with the possibility of further extensions.

It is important to note that a ZEC Company will enjoy the above benefits only in respect of activities undertaken in the Canary Islands. If the activities involve the handling of goods, the company will have to be located in special zones within the Islands, namely the ports of Las Palmas and Tenerife, airports of Tenerife and Gran Canaria, and urban zones of Arinaga in Gran Canaria and Granadilla in Tenerife. When the activities of the company do not involve the physical handling of goods, the company can be located anywhere in the Islands.

The products and services offered by the ZEC Companies can be sold in any market inclusive of the Canaries and mainland Spain without losing the tax benefits.

The regime is the result of negotiations with the European Commission and involves significant changes to the previous regulation as contained in original proposed scheme. Some of them are as follows:

- no banking or stock-exchange dealing companies are allowed as ZEC Companies;
- the deadline, originally set for the year 2024, has been brought forward to 31 December 2008, with possibilities of extensions;
- there are limits for the tax benefits according to the size of individual companies; and
- the objective and subjective "reservoir system", which prevented the companies from being considered Spanish resident companies and sold to Spanish residents, has been cancelled.

Investors should be aware of the ZEC system and the important benefits that it accords. These benefits, in addition to other attractions make the Canaries a perfect destination for offshore investments and residence.

Annex: List of Activities to be Undertaken by ZEC Companies

The following is extracted from the draft of paragraph 3 of Article 3 of the project for the regulation of the Canarian Special Zone and adapted to the Statistics Catalogue of the EEC (NACE):

"3. Solely the following activities are to be carried out in the Canarian Special Zone:

Activities related to the production, transformation, processing and wholesale distribution of goods:

- Fishing: NACE B.
- Food, drinking and tobacco industries: NACE DA.
- Confection and peltry industries: NACE 17.4; 17.5; 17.6; 17.7; 18.
- Footwear and leather: NACE DC.
- Paper, edition, graphic arts and reproduction of engraved supports: NACE DE.
- Chemical industries: NACE 24.
- Construction pre-manufacture: NACE 20.2; 20.3; 24.3; 25.2; 26.1; 26.2; 26.4; 26.7; 28.1; 28.2: 28.12; 28.63; 28.7; 36.1; 45.25; 45.3 and 45.4.
- Construction of machinery and mechanical equipment: NACE 29.
- Electric, electronic and optician materials and equipment: NACE DL.
- Furniture and other manufacturing industries: NACE 36.
- Recycling: NACE 37.
- Wholesale and merchant agents: NACE 50 and 51.

Activities related to services:

- Transport and related activities: NACE 1.
- Software activities: NACE 72.
- Services related to exploitation of natural resources and waste elimination: NACE n.c.
- Services related to research and development: NACE 73.
- Other entrepreneurial activities: NACE 74.
- Services of specialized formation and high studies: NACE 80.3 and 80.4."

Public Policy as Grounds for Refusal of Recognition and Enforcement of Foreign Arbitral Awards in Indonesia

In recent cases Indonesian courts have refused enforcement of foreign arbitral awards in the country by reason of contravention of 'public policy', but the courts' interpretation of the 'public policy' principle may arguably be misconceived

Tony Budidjaja
Dermawan & Co Law Firm
Jakarta, Indonesia
tony@dnc.co.id

Introduction

The ultimate goal of arbitration is the decision of the arbitral tribunal together with a valid and enforceable award. Upon the completion of arbitration, the winning party often seeks judicial enforcement of the arbitral award. The effectiveness and efficiency of arbitration is genuinely dependent on the enforcement of the awards. If the parties to arbitration do not have the option to recognize and enforce the awards, the arbitration proceedings are nothing more than a waste of time and money.

To enforce an arbitral award, the primary consideration is the location of the assets against which enforcement is sought. A court can only assist with the enforcement of an award against assets which are within the jurisdiction of that court (see Mark Huleatt-James & Nicholas Gould, *International Commercial Arbitration (A Handbook)*, LLP, 1996, at 110-111). The location of assets is not, however, the only relevant factor. An application for the enforcement of a foreign award will not get far if the law of the jurisdiction in which the assets are found does not provide for the enforcement of an award made in the country in which the award was made (see Mark Huleatt-James & Nicholas Gould, *op. cit.*). In addition, the successfulness of the enforcement of a foreign award depends on how the enforcement tribunal interprets the public policy defense.

As all arbitration practitioners and scholars know, violation of public policy (or *ordre public*) has long been established as a ground for challenging a domestic arbitral award and refusing recognition and/or enforcement of a foreign arbitral award (see, for example, Articles 34(2)(b)(ii) and 36(1)(b)(ii) of the UNCITRAL Model Law on International Commercial Arbitration ("Model Law") and Article V.2(b) of the New York Convention ("NYC")). Furthermore, in practise, in many countries the public policy defense is the most "invocable" of all defenses. Moreover, the concept of public policy has been interpreted and applied differently from state to state. To date there is no harmonized or predominant concept of public policy, and the terminology used in referring to public policy in national legislation and enforcement conventions also varies.

This article aims to discuss the application of public policy as a ground for refusing enforcement of foreign arbitral awards in Indonesia. This article will critically analyze and evaluate the application of the concept of public policy by the courts in Indonesia and, in this connection, will comment on recent judgments of the Indonesian courts involving the issue of public policy.

Indonesia is a good subject for discussion since its record with respect to the enforcement of foreign arbitral awards leaves much to be desired. Although Indonesia has been a party to the NYC since 1981, foreign arbitral awards against Indonesian parties were almost never regarded as enforceable in Indonesia. Recognizing that the failure to enforce foreign arbitral awards has damaged its image as an

attractive destination for foreign investment, Indonesia has attempted to legislate its way out of trouble. Recently, Indonesia has promulgated its new, and in fact its first comprehensive, arbitration law, namely Law No. 30 of 1999 Concerning Arbitration and Alternative Dispute Resolution ("Arbitration Law"), which took effect from 12 August 1999. This law governs the means by which foreign arbitral awards may be recognized and enforced in Indonesia. It is worth noting that the Arbitration Law does not take the Model Law into account. Therefore, the rules of procedure for enforcement, as well as refusal of enforcement, of foreign arbitral awards in the Arbitration Law differ from those in the Model Law or the national arbitration laws of the countries that adopt the Model Law.

Procedure for Recognition and Enforcement of Foreign Arbitral Awards in Indonesia

It should be noted that the NYC does not set out uniform procedural rules for the enforcement of the Convention awards. This is because the unification of the rules of procedure for the enforcement of foreign arbitral awards was considered a too far-reaching interference with the national laws on procedure. In addition, it could not be considered practical to attempt to spell out the applicable enforcement procedure in full detail in the NYC. Article III of the NYC provides that "each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon". In other words, the rules of procedure for the enforcement of foreign arbitral awards are left to the law of the country in which the enforcement is sought.

The key pieces of Indonesian legislation governing the enforcement of foreign arbitral awards are:

- Presidential Decree No. 34 of 1981 (dated 5 August 1981) concerning the Ratification of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("PD 1981");
- Regulation of the Supreme Court No. 1 of 1990 ("RSC 1990"); and
- the Arbitration Law.

The rules of procedure for the recognition and enforcement of "international" arbitral awards are mainly governed in the Second Part of Chapter VI of the Arbitration Law (*i.e.* Articles 65-69).

According to the Arbitration Law, there are two main types of arbitral awards, namely "domestic arbitral awards" ("DAAs") and "international arbitral awards" ("IAAs") (it is important to note that the Arbitration Law uses the term "international arbitral awards" instead of "foreign arbitral awards" as used in the NYC and RSC 1990). IAAs are defined in Article 1(9) of the Arbitration Law as "awards rendered by an arbitration institution or individual arbitrator(s) outside the jurisdiction of the Republic of Indonesia or awards by an arbitration institution or individual arbitrator(s) which, under the provisions of Indonesian law are deemed to be international arbitration awards" (*cf.* Article I of the NYC, which provides that: "This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought ... It shall also apply to arbitral awards *not considered as domestic awards* in the State where their recognition and enforcement are sought" (emphasis added)). Since to date there has been no provision of law, or even judgment of the Supreme Court, which confers the status of an international arbitration to any arbitral reference held or award rendered within Indonesia, clearly only awards rendered outside of this jurisdiction are regarded as "international" awards. Unfortunately, however, the Arbitration Law does not provide any definition of DAAs.

Pursuant to Article 1(9) of the Arbitration Law, the Indonesian court is obliged to apply the provisions on the recognition and enforcement of IAAs under the Arbitration Law to an award made outside of Indonesia (*e.g.* in France), regardless of the nationality of the parties (*e.g.* the parties to the dispute are an Indonesian company and an East Timorese party, and as at the time of writing of this article, East Timor is not a signatory to the NYC) or of the matter of the dispute. Furthermore, the definition of IAAs does not contain any indication that the underlying transaction should be international. The consequence is that, at least in theory, the Arbitration Law also applies to an award made in a foreign country in respect of a matter which is purely domestic for the country where the award was made.

An arbitral award cannot be enforced immediately in Indonesia. The party who has obtained the award must seek the intervention of the courts in order to convert the award into a judgment or an enforceable order. Only then can execution be levied. In the context of IAAs, Article 65 of the Arbitration Law stipulates that it is the jurisdiction of the District Court of Central Jakarta ("DCCJ") to handle the

recognition and enforcement of the awards in Indonesia. Thus, unlike the preceding arbitration laws, under the Arbitration Law applications for enforcement are no longer required to be submitted to the Supreme Court, unless the Republic of Indonesia itself is a party to the arbitrated dispute (see Article 66.e of the Arbitration Law). Vesting jurisdiction to enforce IAAs with the same courts that regularly exercises such jurisdiction over DAAs now makes the procedure consistent with Article III of the NYC, which provides for a simplified and expeditious procedure for the enforcement of arbitral awards.

Article 65.d of the Arbitration Law provides that "an International Arbitral Award can be enforced after obtaining exequatur from the President of the District Court of Central Jakarta". It should be noted here that, with respect to the enforcement of IAAs, rejection of exequatur by the DCCJ can be appealed to the Supreme Court (Article 68(2) of the Arbitration Law), whereas issuance of exequatur is not subject to appeal (Article 68(4) of the Arbitration Law). Nor may a decision of the Supreme Court either issuing or rejecting exequatur where the Government of Indonesia is a party be appealed.

Refusal of Recognition and Enforcement of Foreign Arbitral Awards in Indonesia

Unlike the NYC, the Arbitration Law only provides three substantial grounds for refusing recognition and enforcement of a foreign arbitral award. Pursuant to Article 66 of the Arbitration Law, in response to an application for enforcement of a foreign arbitral award, the court has to grant its exequatur in order to enforce the award in accordance with the normal procedural law, unless:

a. the award is rendered in a state which is not bound by any bilateral or multilateral convention or treaty on the recognition and enforcement of foreign arbitral awards, by which Indonesia is bound;

b. the legal relationship on which the award was based cannot be considered as commercial under Indonesian law; and

c. recognition or enforcement of the award would be contrary to public policy.

After the ratification of the NYC but before the issuance of RSC 1990, all applications for enforcement of foreign arbitral awards in Indonesia were refused mainly because of the absence of provisions equivalent to the implementing regulation of the NYC (even though the NYC has in fact been ratified by PD 1981), and in one case because of misinterpretation of the reciprocity reservation by the court. (The "reciprocity reservation" means that Indonesia shall apply the NYC to arbitral awards made in the territory of other contracting states only on the basis of reciprocity.) Nevertheless, none of these applications was refused on the public policy ground.

The situation has been different since the issuance of RSC 1990. From all cases of applications for enforcement of foreign arbitral awards in Indonesia after the issuance of RSC 1990 up to the writing of this article, it appears that public policy was used as a prevalent ground for Indonesian courts to refuse the enforcement of foreign arbitral awards in Indonesia. In three out of four cases, applications for enforcement of foreign arbitral awards were refused on the ground of public policy. Only in one case was the application for enforcement of foreign arbitral awards refused on the ground that the underlying agreement had not been signed by the parties (see Decision of the Supreme Court No. 3 Pen.Ex'r/Arb.Int/Pdt/1992 dated 6 April 1994, in the case of *Sikinos Maritime (Malta) v. Perdata Lot (Indonesia)*). Interestingly, enforcement of foreign arbitral awards in Indonesia was successful only in those cases where the losing parties did not actively resist such enforcement. In other words, enforcement of foreign arbitral awards in Indonesia were never successful where the losing parties actively resisted such enforcement.

Concept of Public Policy in Indonesia

It is notoriously difficult to provide a precise definition of "public policy" in the context of the recognition and enforcement of foreign arbitral awards. It has been argued that the public policy defense to the recognition and enforcement of foreign arbitral awards is an acknowledgment of the right of the state and its courts to exercise ultimate control over the arbitral process. The notion of public policy is grounded in national law and indeed differs from state to state. In some legal systems "public policy" is understood broadly in the sense that it might relate to an imperative rule of national law, while in other legal systems the term relates solely to the core of fundamental provisions of law. Furthermore, in some of those legal systems there is a dichotomy between the notion of public policy as applied to domestic affairs, and the notion of public policy in respect of private international law matters.

As noted above, Article 66.c of the Arbitration Law provides that "an International Arbitral Award ... can only be enforced in Indonesia if the award is not contrary to public policy". It is obvious that if an application for enforcement is made before the Indonesian court, it is the Indonesian public policy that has to be examined. Unfortunately, however, the Arbitration Law does not define public policy. The only Indonesian law that provides a definition of public policy is the RSC 1990. Article 4(2) of the RSC 1990 defines the term as "the basic principles of the entire legal system and society in Indonesia". This definition is, however, still vague and needs clarification, at least through the practise of the courts in Indonesia. Unfortunately, so far there has been no judicial decision in Indonesia in which the court provided a clear definition of public policy.

To understand and evaluate how the Indonesian courts have interpreted and applied the public policy defense to the enforcement of foreign arbitral awards, three recent cases in which foreign arbitral awards could not be enforced in Indonesia due to the public policy defense will now be examined in turn.

E.D. & F. Man (Sugar) Limited v. Yani Haryanto

This case is the first case where the enforcement of a foreign arbitral award was refused in Indonesia on public policy ground.

In February and March 1982, Yani Haryanto ("Haryanto") contracted to buy respectively 300,000 and 100,000 metric tons of white sugar from an English commodities broker, E.D. & F. Man (Sugar) Limited ("Man"), to be delivered in 1983/1984. Payment was to be made by irrevocable letter of credit in favor of Man, payable against delivery of shipping documents in London. The parties had agreed to arbitrate in the London Court under the Rules of the Refined Sugar Association if any dispute arose from the two contracts involved. Both contracts were governed by English Law, and expressly provided that the buyer was to be "entirely responsible for obtaining any necessary import license and failure to obtain such license shall not be sufficient grounds for *force majeure*". Following the collapse of sugar prices in 1982/1983, Haryanto failed to open the requisite letters of credit, and subsequently cancelled the contracts. On the other hand, in order to fulfill its obligations under the contracts, Man had already purchased the sugar from another party. Nevertheless, Man had not delivered the sugar to Haryanto, since the letters of credit were not opened.

In June 1984, Man sought arbitration in the London Court, which decided that Man was entitled to compensation of US$ 146.3 million for breach of the contracts. However, Haryanto refused to pay the compensation. In response to the award, Haryanto filed a lawsuit in the English High Court in London, seeking: (a) a declaration that the contracts were not valid or binding; and (b) an injunction staying the arbitration. In essence, Haryanto argued that he had not clearly understood the language of the contracts. However, the English High Court dismissed the lawsuit, and the English Court of Appeal affirmed the dismissal. The Court of Appeal expressly declared that Haryanto was bound by the contracts, including the arbitration provision (see *Yani Haryanto v. E.D. & F. Man (Sugar) Limited* [1986] 2 Lloyd's Rep 44).

On 7 July 1986, the parties commenced negotiation, which resulted in Haryanto agreeing to pay compensation of US$ 27 million to Man. This payment was to be paid by three installments over three years. On 31 July 1987 Haryanto paid the first installment of US$ 5 million to Man. However, he defaulted in the other two installments. Man brought the matter to the English Bar in London. On 17 November 1989, the Queen's Counsel of the English Bar rendered the award ordering Haryanto to pay the rest of the compensation (*i.e.* US$ 22 million) plus interest thereon at the rate of 9% per annum, from 12 August 1988 until the day of the decision. However, Haryanto still failed to pay.

In August 1988, Haryanto filed a case with the DCCJ seeking annulment of the original sale and purchase contracts. Haryanto argued that the contracts violated Presidential Decrees No. 43 of 1971 dated 14 July 1971 and No. 39 of 1978 dated 6 November 1978, which allegedly provided that only the Indonesian Logistic Board could import sugar into Indonesia. In addition, Haryanto requested that the settlement agreement made by the parties on 7 July 1986 be declared invalid. Having adjudicated the case, the DCCJ held that the agreement was null and void since it contained an illegal causa (consideration). (See Judgment No.499/Pdt/G/VI/1988/PN.Jkt.Pst., dated 29 June 1989.) In its judgment, the DCCJ rejected the absolute demurer filed by Man, which mainly contended that the court had no competence over the case considering that the parties had entered into an arbitration agreement. Man appealed to the High Court of Jakarta ("HCJ"), but the HCJ affirmed the decision of the DCCJ. Subsequently, Man applied to the Supreme Court for cassation.

At about the same time, Man countered Haryanto's lawsuit by commencing a separate lawsuit against Haryanto at the DCCJ, claiming repayment of Haryanto's debt. However, the DCCJ dismissed Man's claim, and further, upon the counterclaim of Haryanto, the court declared that the contracts were illegal on the ground that they arose out of an illegal causa (consideration). (See Judgment No.836/Pdt/G/VI/1988, dated 29 June 1989.) The DCCJ also held that the English Bar award was not *res judicata* and the Indonesian court was not bound to recognize it because the award violated Indonesian public policy. (It is submitted, however, that the court seemed to have ignored the fact that the contracts only provided for shipment to an Indonesian port, not importation into Indonesia, and that Haryanto expressly assumed the risk of not being able to import the sugar.) The HCJ affirmed the judgment of the DCCJ, and therefore Man filed another request for cassation at the Supreme Court.

While the case was being processed by the Supreme Court in the cassation level, the Supreme Court, upon application for enforcement of foreign arbitral award filed by Man on 5 November 1990, issued an exequatur in favor of Man (see Decision of the Supreme Court No. 1 Pen. Ex'r/Abt.Int/Pdt/91, dated 1 March 1991). In its decision, the Supreme Court simply stated that "the application is not contrary to the fundamental principles of legal and social system in Indonesia (public policy), and therefore the application for exequatur can be accepted". However, the Supreme Court issued a letter ordering the DCCJ "to postpone the enforcement of the international award pending an instruction from the Supreme Court because the subject matter of the case is being processed in the cassation level" (see Letter from the Supreme Court to the DCCJ No. KMA/192/XII/1991, dated 7 December 1991). The DCCJ therefore refused to enforce the arbitral award.

Subsequently, the Supreme Court in the cassation level, in respect of the civil cases respectively filed by Haryanto and Man, decided to affirm the decisions of the DCCJ and the HCJ to invalidate the original contracts. (See, respectively, Judgment of the Supreme Court No. 1205K/Pdt/1990, dated 14 December 1991, and Judgment of the Supreme Court No. 1203K/Pdt/1990, dated 4 December 1991.) By those judgments, the Supreme Court considered that the exequatur to enforce the foreign arbitral award was no longer enforceable due to the invalidity of the original contracts. The Supreme Court held that, "given the agreement was null and void, the Decision of the Supreme Court (granting the exequatur) becomes irrelevant to be enforced". In correcting the exequatur, the Supreme Court held that it did not deal with the legal aspects of the original contracts and that it was issued merely to enforce the foreign arbitral award.

The judgments show that the Supreme Court did not consider or apply the "principle of severability of arbitration clauses". Furthermore, it appears that the term "public policy" was too broadly interpreted. This would create uncertainty over the availability of means of enforcing arbitral awards.

Bankers Trust v. Mayora Indah; *Bankers Trust v. Jakarta International Hotels & Development*

The leading case on the question of public policy in Indonesia after the commencement of the Arbitration Law is the case of *Bankers Trust Company and Bankers Trust International v. Mayora Indah*, which was in substance similar to the case of *Bankers Trust Company and Bankers Trust International v. Jakarta International Hotels & Development*. Both cases related to Currency and Interest Rate Swaps transactions effected on the basis of the International Swaps and Derivatives Association ("ISDA") Master Agreement together with the Schedule thereto, which was governed by English law. The opening paragraph of the ISDA Master Agreement stated: "[...] and [...] have entered and/or anticipate entering into one or more transactions (each a 'Transaction') that are or will be governed by this Master Agreement, which includes the schedule (the 'Schedule')". The Schedule contained an arbitration clause, by which the parties agreed to refer disputes to arbitration in London in accordance with the Rules of the London Court of International Arbitration (LCIA). For present purposes, the following discussion will focus on the *Mayora Indah* case.

In 1997, Mayora Indah ("Mayora") defaulted in making payments to Bankers Trust Company and Bankers Trust International (jointly "BT") as required by the ISDA Master Agreement. While negotiation between BT and Mayora was taking place, Mayora commenced a civil case at the District Court of South Jakarta requesting the court to annul the ISDA Master Agreement and order BT to pay compensation for "damage" allegedly suffered by Mayora. At about the same time, BT filed an arbitration application with the LCIA in London, on the basis that disputes had arisen between the parties as to whether Mayora had defaulted in making payments to BT as aforesaid.

In the Indonesian proceedings, Mayora raised a number of challenges to the validity of the arbitration agreement. First, Mayora alleged that the ISDA Master Agreement, and hence the arbitration agreement, was not binding because it was ultra vires the company to enter into it. Secondly, Mayora alleged that the arbitration agreement, which was set out in the Schedule, had not been incorporated into the ISDA Master Agreement, and Mayora had only agreed to be bound by the ISDA Master Agreement.

It is important to note that, as the parties had agreed that any dispute among them was to be referred to and finally resolved by arbitration under the Rules of the LCIA in London, the Indonesian courts could not possibly have jurisdiction under Indonesian laws to hear Mayora's lawsuit against BT. In any event, the allegation raised by Mayora in its lawsuit seemed tenuous because, having regard to its structure and substance, the ISDA Master Agreement was not workable without the Schedule thereto. That notwithstanding, the court accepted Mayora's contentions and decided to annul the ISDA Master Agreement and even awarded Mayora damages in the sum of US$ 51,499,197.21.

On the other hand, in the arbitration proceedings in London, the arbitral tribunal held that the English law made it clear that an arbitration agreement was a free standing and severable adjunct to the underlying agreement in relation to which it was intended to operate. It could continue even if the underlying agreement was unenforceable by reason of, for example, illegality. It was also clear that, even if the ISDA Master Agreement had not contained an arbitration agreement, the parties could have agreed to refer the dispute about whether Mayora had entered into it ultra vires its powers, to an *ad hoc* arbitration. Extending these principles, there was no reason in principle why the arbitration agreement the parties did enter into should not remain fully enforceable for the purpose of resolving the dispute as to whether the underlying agreement was ultra vires.

As for Mayora's contention that it had never accepted or executed the arbitration agreement in the Schedule, the LCIA held that the documents available to the court showed beyond doubt that Mayora did agree that the Schedule should be incorporated into and be applicable to the ISDA Master Agreement. Mayora having seen a copy of the final draft of the ISDA Master Agreement had asked for a copy for execution. The copy sent clearly included the Schedule that, in Part 5, set out the arbitration agreement. A person described as the President Director of Mayora subsequently signed the ISDA Master Agreement, and two persons respectively described as the President Commissioner and the Commissioner of Mayora also issued a letter of approval. Accordingly it had been agreed by those apparently representing Mayora that the parties were bound by the ISDA Master Agreement and the Schedule thereto, including the arbitration agreement. In the circumstances, the LCIA declared that Mayora had defaulted in payment and had violated the arbitration agreement contained in the ISDA Master Agreement, and the LCIA ordered Mayora to pay to BT a certain sum of money as compensation.

Given Mayora did not want to voluntarily comply with the arbitral award, on 14 December 1999, the arbitrators registered or deposited the award with the DCCJ, in accordance with the procedure prescribed by Article 67(1) of the Arbitration Law. Thereafter, BT duly filed an application for exequatur to the President of the DCCJ. Interestingly, the DCCJ dealt with BT's application as if it were an ordinary civil case. In this regard, the DCCJ notified Mayora of BT's application for enforcement and allowed Mayora to submit a response. even though the Arbitration Law did not regulate that matter. Even more interestingly, Mayora filed its response to the application for exequatur with the DCCJ as an ordinary civil application. namely "application for not granting exequatur". The DCCJ then issued a curious decision, *i.e.* a decision to consolidate Mayora's application for not granting exequatur and BT's application for exequatur. In the event, the DCCJ accepted Mayora's arguments and refused BT's application for exequatur. The reasoning given by the DCCJ was as follows:

1. Before the Applicants (*i.e.* BT) filed an arbitration application to the LCIA, there already existed in Indonesia (in this case, at the District Court of South Jakarta) proceedings between the Applicants and the Respondent (*i.e.* Mayora):
2. In the proceedings at the District Court of South Jakarta registered under Reg. No. 489/Pdt/G/1999/PN.Jkt.Sel., the Respondent was the Plaintiff and the Applicants were the Defendants:
3. In the above proceedings, the District Court of South Jakarta delivered its final judgment on 5 October 1999, mainly "cancelling or declaring void the ISDA Master Agreement dated 25 April 1997 between the Plaintiff [now the Respondent] and the Defendants [now the Applicants]";

4. Apart from the said proceedings at the District Court of South Jakarta, in the LCIA there were also proceedings between the Applicants and the Respondent in respect of the same case;
5. Subsequently the LCIA rendered an award in respect of the above proceedings, namely Arbitration award No. 8119 dated 24 September 1999 (as revised by Memorandum dated 10 October 1999);
6. Therefore, as between the same parties and on the same subject matter, based on the said ISDA Master Agreement, there were two cases with different and contradictory awards: (a) the LCIA arbitration award; and (b) the judgment of the District Court of South Jakarta dated 5 October 1999;
7. Generally speaking, an arbitral award was final and binding in nature, and could be placed on a par with an absolute judgment;
8. The judgment of the District Court of South Jakarta was not yet final and binding because, theoretically speaking, it was still subject to any subsequent proceedings and judgments in the High Court or the Supreme Court of the Republic of Indonesia;
9. The function of the President of the District Court in an application for exequatur was not as a judge examining and trying a case, but was to deal with a request to determine whether or not an award could be enforced. Accordingly, the President of the District Court had no authority to intervene or even judge whether or not the award filed by the Applicants or by the Respondent was lawful;
10. Therefore, the problem in this case was: if there was a final and binding judgment (whether actual or so deemed by law), but there was also another judgment in the process, could the former be executed, in particular if the two judgments were contradictory?;
11. According to court practise, in such a case execution of the absolute judgment would be suspended until the case in the process reached a final and binding conclusion.

The Court considered the following factors:

- If the LCIA award remained to be exercised but there was a judgment of the District Court of South Jakarta cancelling the underlying agreement being the legal basis of the said award, it would clearly disturb and be contradictory to public policy if enforcement of the said award were allowed; and
- Article 66.c of the Arbitration Law stated, inter alia, that: "International Arbitration Award as referred to in item a. can only be exercised in Indonesia only if it is not contradictory to public policy".

The Court therefore concluded that, until the judgment of the District Court of South Jakarta was cancelled by the High Court or the Supreme Court of the Republic of Indonesia and the cancellation of the judgment became final and binding, the application for exequatur of the LCIA award could not be allowed, since otherwise it would be deemed to be "contradictory to public policy" under Article 66.c of the Arbitration Law.

In the above judgment, the Court appeared to have reconsidered the facts underlying the foreign arbitral award before deciding that there had been a violation of public policy. In this regard, the court considered and accepted the arguments stated by Mayora in its application for not granting the exequatur. It is important to note that the way the court processed the Mayora's application for not granting exequatur was inconsistent with the prevailing Indonesian procedural law. Under Indonesian procedural law, only certain applications specified by law can be filed with the court. In this regard, there is no provision of law allowing the court to accept the application for not granting the exequatur as filed by Mayora. Furthermore, as an *ex parte* case, courts can only accept applications which do not contain a dispute. The submission of Mayora's response in the form of a civil application was therefore contradictory to the Indonesian procedural law. That explained why once BT knew that the court had accepted and then consolidated Mayora's application with BT's application for exequatur, BT immediately filed a request for cassation to the Supreme Court. Unfortunately, the Supreme Court in the cassation level has refused the request for cassation by reason of certain formal irregularities, without considering the arguments put forward by BT.

Besides appealing from the consolidation decision of the DCCJ, BT also appealed to the Supreme Court from the decision of the DCCJ refusing to grant the exequatur. But again, the Supreme Court in the cassation level upheld the opinion of the DCCJ (see Judgment of the Supreme Court No. 02 K/Ex'r/Arb.Int/Pdt/2000, dated 5 September 2000). The main reasons given by the Supreme Court were:

"The [DCCJ] is correct and right, because even though the application for exequatur is an

administrative formal process, but pursuant to Article 66.c, the Court has authority to determine whether the object of the application violates the public policy, including the prevailing legal order;

"The arbitral award is based on the agreement, which is still being a dispute in a case at the District Court of South Jakarta;

"The agreement on which the award was based has been annulled by the Judgment of the District Court of South Jakarta No.489/Pdt.G/1998 dated 5 October 2000, and the Judgment is not final and binding yet.

"Therefore, the application for exequatur must be refused because it violates the prevailing legal order, in particular the process order."

The Supreme Court delivered a similar judgment in the *BT v. JIHD* case (see Judgment of the Supreme Court No. 04 K/Ex'r/Arb.Int/Pdt/2000, dated 5 September 2000), giving the following reasons:

"Even though the function of the [DCCJ] in processing the application for exequatur is administrative, but pursuant to Article 66.c of the Arbitration Law, the Court has authority to examine the subject matter of the application for exequatur as to the issue whether the object of the application violates the public policy, including the prevailing legal order;

"The arbitral award to be enforced is based on the legal relationship, which has been annulled by the District Court of South Jakarta through its Judgment No. 46/Pdt.G/1998/PN.Jkt.Sel. dated 9 December 1999, which is not final and binding yet.

"Since the application for enforcement of the arbitral award is based on the same legal relationship but contradictory to each other, then the application must be refused because it violates the prevailing legal order, in particular the process order.

"Because this particular case is still being a dispute between the Applicants and the Respondent, which has been adjudicated by the District Court of South Jakarta, where the Applicants were decided as the losing parties, and the judgment is not final and binding yet, then the application for enforcement of the International Arbitral Award of London Arbitration No. 9128 filed by the Applicants must be stayed until the Judgment of the District Court of South Jakarta No.46/Pdt.G/1999 dated 9 December 1999 becomes final and binding."

It is obvious from the above judgments that the Supreme Court has interpreted and applied the public policy defense very broadly. Under Article 66.c of the Arbitration Law, in determining whether the public policy defense should apply or not, the Supreme Court should only examine the "arbitral award", not other circumstances. If the arbitral award is not contrary to public policy, then the Court must grant its exequatur. In its judgment, the Supreme Court expressly stated that the "application for exequatur" – not the "award" – was contrary to public policy. There is no requirement under the Arbitration Law that an "application for exequatur" may not be filed if there is an ongoing case at the Indonesian court. This issue is significant because in the international arbitration context it is common for the losing party to actively resist the award by commencing proceedings at courts. If the interpretation of "public policy" by the Supreme Court were correct, then even more parties who lost in arbitration would follow this precedent and easily resist or at least delay the enforcement of the award against them by filing a case at the Indonesian court.

In accordance with Article 4(2) of RSC 1990, to apply the defense of public policy, the court should have examined the infringement of conceptions of morality, and whether the award in question offended Indonesian legal and social conceptions. In this regard, the court should have examined, among other things, the principles of law or morality that the arbitral award had violated.

It is interesting to note also that the Supreme Court in its judgment interpreted "legal order" as an element of public policy. It appears that the Court deemed that the "legal order" was a fundamental principle of Indonesian law. However, it is unclear what legal order had been violated in this case. The Court appeared to have deemed the existence of the Indonesian court judgment annulling the underlying agreement as the Indonesian legal order. However, this interpretation cannot be justified under Indonesian law. Under Article 10.f of the Arbitration Law, an arbitration agreement shall not be void because of the termination or annulment of an underlying agreement. Under Article 3 of the Arbitration Law, the District Court has no authority to adjudicate a dispute bound by an arbitration agreement. Moreover, under Article 60 of the Arbitration Law, an arbitral award shall be final and binding. Therefore, the court cannot possibly refuse or stay the enforcement of the award.

In determining whether to enforce a foreign

arbitral award, the Indonesian courts should take into account principles of international comity and expeditious resolution of disputes. The court, when considering public policy, should distinguish between domestic public policy and international public policy. Notwithstanding the differences in terminology in the legislation, the relevant case law and commentaries indicate that the courts of many countries apply a concept of international public policy, which is generally regarded as more restrictive than domestic public policy. Where the objective is to facilitate international trade, most contracting parties to the NYC apply the public policy exception more sparingly in an international context than in a purely domestic context.

The prevailing view is that the notion of public policy should be used in a restrictive sense so that it would only be invoked in rare cases. With a view to achieving the objectives of the NYC, it is desirable to avoid giving a broad interpretation to the notion of public policy. If the Indonesian courts adopt this narrow definition of public policy, then the public policy defense should not play a significant role in obstructing the enforcement of foreign arbitral awards in Indonesia.

In any event, at present, the *BT* cases are still unresolved. After being notified of the judgment of the Supreme Court, BT has filed a request for civil review (*request civil*) to the Supreme Court. It will undoubtedly be interesting to see what the final outcome is.

Conclusion

Indonesia's record with respect to the enforcement of foreign arbitral awards leaves much to be desired. The three recent cases discussed above have given Indonesia something of a negative reputation as far as the enforcement of foreign arbitral awards is concerned. It is of course difficult to draw any firm conclusion on the issue of the public policy defense in Indonesia from only a handful of cases, but the Indonesian courts do appear to have a tendency to deter the enforcement of foreign arbitral awards under the name of public policy. It is submitted that in these cases, the public policy defense had been too broadly interpreted by the Indonesian courts.

It appears from the *BT v. Mayora* and *BT v. JIHD* cases that the Supreme Court has closed the door to the possibility of enforcing foreign arbitral awards in cases where there are pending proceedings in Indonesia. The controversial decisions in the *BT* cases have created uncertainty over whether a foreign arbitral award can be enforced if there is an ongoing case between the same parties in Indonesia.

Procedural issues may create delays and disappointment to a successful party in arbitration. One of the major problems for parties seeking enforcement of foreign arbitral awards in Indonesia is the lack of a firm deadline by which the court has to respond to an application for exequatur. Furthermore, it is unclear under the Arbitration Law whether an application for exequatur should be made *ex parte* or by originating summons. Moreover, the Arbitration Law is silent on the specific provisions regarding the procedure for suspending enforcement of foreign arbitral awards. Thus, although Indonesia has made remarkable strides in overcoming many of the doctrinal obstacles to enforcement, the existing laws are deficient in many respects and await further reforms.

INTER-PACIFIC BAR ASSOCIATION

M.S. Lin Scholarships

The Inter-Pacific Bar Association is pleased to announce the establishment of the M.S. Lin Scholarship Program to enable practising lawyers to attend the IPBA's Twelfth Annual Meeting and Conference in Hong Kong from 3 to 7 May 2002.

What is the Inter-Pacific Bar Association?

The Inter-Pacific Bar Association (IPBA) is an international association of business and commercial lawyers with a focus on the Asia-Pacific region. Members are either Asia-Pacific residents or have a strong interest in this part of the world. The IPBA was founded in April 1991 at an organising conference held in Tokyo attended by more than 500 lawyers from throughout Asia and the Pacific. Since that time, it has grown to become the pre-eminent organisation in the area of Asian law and business with a membership of approximately 1,800 lawyers from 62 jurisdictions around the world. Lawyers in most law firms in the Asia-Pacific region that have a cross-border practice are members of the IPBA.

What is the IPBA Annual Meeting and Conference?

The highlight of the year for the IPBA is its annual multi-topic four-day conference, usually held around the end of April/first week of May each year. The conference has become the "must attend event" for business and commercial lawyers in the region. In addition to plenary sessions of interest to all lawyers, programs are presented by the IPBA's 17 specialist committees. The IPBA annual meeting and conference provides an opportunity for lawyers throughout the region to get to know each other better and to strengthen their legal knowledge and practice skills. Previous annual conferences have been held in Tokyo, Sydney, Taipei, Singapore, San Francisco, Manila, Kuala Lumpur, Auckland, Bangkok, Vancouver and Tokyo, attracting as many as 700 lawyers plus accompanying persons. Next year the conference will be held in Hong Kong from 3 to 7 May 2002.

What are the M.S. Lin Scholarships?

The M.S. Lin Scholarships were created to honour the memory of M.S. Lin of Taiwan, who was one of the founders and a past President of the IPBA. The purpose of the M.S. Lin Scholarships is to bring to the IPBA Annual Meeting and Conference lawyers who would not otherwise be able to attend and who would both contribute to, and benefit from, attending the conference.

Who is eligible to be an M.S. Lin Scholar?

Lawyers from Developing Countries

To be eligible, the applicants must:
- be an indigenous lawyer in Vietnam, Laos, Cambodia, Myanmar, Mongolia or the Pacific Islands;
- be fluent in both written and spoken English (given this is the conference language); and
- currently be involved in a cross-border practice or wish to become engaged in a cross-border practice.

Young Lawyers

To be eligible, the applicants must:
- be under 35 years of age and have less than five years of practice;
- be fluent in both written and spoken English (given this is the conference language);
- have taken an active role in the legal profession in their countries;
- currently be involved in a cross-border practice or who would like to become engaged in a cross-border practice; and
- have published an article in a reputable journal on some topic related to the work of one of our committees or provide some other objective evidence of committed involvement in the profession.

Preference will be given to those applicants who could not otherwise attend the conference, for example, because of personal or family financial circumstances and/or because they are working for a small firm which could not afford to send them to the conference. Applicants from multinational firms will normally be considered only if they have a substantial part of their attendance expenses provided by their firm.

In order to spread the benefit of these scholarships further, applicants should set out the amount they or their firm could pay towards the airfare and conference fee, taking into account their personal and family circumstances and their firm's situation.

Each M.S. Lin Scholar will receive:

1. Return economy class transportation from the scholar's home city to Hong Kong.
2. Waiver of the Hong Kong conference registration fee.
3. Accommodation in a conference hotel for four nights.
4. *Per diem* living expenses of $20 per day.
5. Waiver of IPBA annual membership fees for 2002, 2003 and 2004.

How does one apply to be an M.S. Lin Scholar?

To apply for an M.S. Lin Scholarship, please obtain an application form and return it to Kaori Hashimoto at the IPBA Secretariat in Tokyo no later than 28 September 2001. Application form is available either through the IPBA website (HYPERLINK http://www.ipba.org or www.ipba.org) or at the IPBA Secretariat.

Please send applications to the IPBA Secretariat at:

2/F Prime Square City
1-1-7 Hiroo, Shibuya-ku
Tokyo 150-0012, Japan

Telephone: (+81 3) 3409-2381
Facsimile: (+81 3) 3409-2033
E-mail: ipba@tga.co.jp

What happens once a candidate is selected?

The following procedures will apply after selection:

The Secretary-General will notify each successful applicant that he or she has been awarded an M.S. Lin Scholarship. The notification will be provided at least two months prior to the opening of the conference. Unsuccessful candidates will also be notified.

Airfares and accommodation will be arranged by the Hong Kong Conference Committee after consultation with the successful applicants.

A liaison person for each Scholar will be arranged. The liaison person will be available to the Scholar to introduce him or her to the IPBA and generally help the Scholar obtain the most benefit from the conference.

INTER-PACIFIC BAR ASSOCIATION

An Invitation to Join the Inter-Pacific Bar Association

The IPBA is an international association of business and commercial lawyers who reside or have an interest in the Asian and Pacific region. The IPBA has its roots in the region, having been established in April 1991 at an organizing conference in Tokyo attended by more than 500 lawyers from throughout Asia and the Pacific. Since then it has grown to over 1,800 members from over 65 jurisdictions, and it is now the pre-eminent organization in the region for business and commercial lawyers.

The growth of the IPBA has been spurred by the tremendous growth of the Asian economies. As companies throughout the region become part of the global economy they require additional assistance from lawyers in their home country and from lawyers throughout the region. One goal of the IPBA is to help lawyers stay abreast of developments that affect their clients. Another is to provide an opportunity for business and commercial lawyers throughout the region to network with other lawyers of similar interests and fields of practice.

Supported by major bar associations, law societies and other organizations throughout Asia and the Pacific, the IPBA is playing a significant role in fostering ties among members of the legal profession with an interest in the region.

IPBA Activities

The breadth of the IPBA's activities is demonstrated by the number of specialist committees listed overleaf. All of these committees are active and have not only named chairs, but a significant number of vice-chairs to assist in the planning and implementation of the various committee activities. The highlight of the year for the IPBA is its annual multi-topic 4-day conference, usually held in the first week of May each year. Previous annual conferences have been held in Tokyo, Sydney, Taipei, Singapore, San Francisco, Manila, Kuala Lumpur, Auckland, Bangkok and Vancouver, attracting as many as 700 lawyers plus accompanying guests.

The IPBA has organized regional conferences and seminars on subjects such as Practical Aspects of Intellectual Property Protection in Asia (in five cities in Europe and North America respectively) and Asian Infrastructure Development and Finance (in Singapore). The IPBA has also cooperated with other legal organizations in presenting conferences – for example on Trading in Securities on the Internet, held jointly with the Capital Market Forum.

The IPBA also publishes a membership directory and a quarterly *IPBA Journal.*

Membership

Membership in the Association is open to all qualified lawyers who are in good standing and who live in, or who are interested in, the Asia-Pacific region.

- Standard Membership .... US$125 / ¥18,000
- Three-Year Term Membership .... US$325 / ¥46,000
- Lawyers in developing countries with low income levels .... US$ 75 / ¥10,800
- Young Lawyers (under 30 years old) .... US$ 50 / ¥ 7,200

Annual dues will cover the period of one year starting from January 1 and ending on December 31. Those who join the Association before August 31 will be registered as a member for the current year. Those who join the Association after September 1 will be registered as a member for the rest of the current year and for the following year.

Qualified lawyers who attend the IPBA Annual Meeting and Conference and pay the non-member conference fee will be automatically registered as a member for the then current year ending on December 31.

Membership renewals will be accepted until July 31.

Selection of membership category is entirely up to each individual. If the membership category is not specified in the registration form, standard annual dues shall be charged by the Secretariat.

Membership dues from 1996 to 2000 will be waived for indigenous lawyers from Cambodia, Myanmar, Vietnam and Laos who are, or who are interested in, handling business and commercial matters that are cross-border or that involve a foreign party.

Further, in order to encourage young lawyers to join the IPBA, a Young Lawyers Membership category (age under 30 years old) with special membership dues has been established.

IPBA has established a new 3-Year Term Membership category which will come into effect from the 2001 membership year.

There will be no refund of dues for cancellation of all membership categories during the effective term, nor will other persons be allowed to take over the membership for the remaining period.

Corporate Associate

Any corporation may become a Corporate Associate of the Association by submitting an application form accompanied by payment of the annual subscription of (¥50,000/US$500) for the then current year.

The name of the Corporate Associate shall be listed in the membership directory.

A Corporate Associate may designate one employee ("Associate Member"), who may take part in any Annual Conference, committee or other programmes with the same rights and privileges of a Member, except that the Associate Member has no voting rights at Annual or Special Meetings, and may not assume the position of Council Member or Chairperson of a Committee.

A Corporate Associate may have any number of its employees attend any activities of the Association at the member rates.

- Annual Dues for Corporate Associates .... US$500 / ¥50,000

Payment of Dues

Payment of dues can be made either in US dollars or Japanese yen. However, the following restrictions shall apply to payments in each currency. Your cooperation is appreciated in meeting the following conditions.

A US dollar check should be payable at a US bank located in the US. US dollar check payable in Japan may be returned to sender depending on charges.

A Japanese yen check should be payable at a Japanese bank located in Japan.

Japanese yen dues shall apply to all credit card payment . Please note that the amount charged will not be an equivalent amount to the US dollar dues.

Please do not instruct your bank to deduct telegraphic transfer handling charges from the amount of dues. Please pay related bank charges in addition to the dues.

See overleaf for membership registration form

INTER-PACIFIC BAR ASSOCIATION

IPBA SECRETARIAT

Prime Square City 2/F, 1-1-7 Hiroo, Shibuya-ku, Tokyo 150-0012, Japan
Tel. 81-3-3409-2381 Fax. 81-3-3409-2033 E-Mail: ipba@tga.co.jp

IPBA MEMBERSHIP REGISTRATION FORM

MEMBERSHIP CATEGORY AND ANNUAL DUES:

- [ ] Standard Membership .... US$125 or ¥18,000
- [ ] 3-Year Term Membership .... US$325 or ¥46,000
- [ ] Lawyers with low income levels in developing countries .... US$ 75 or ¥10,800
- [ ] Young Lawyers (under 30 years old) .... US$ 50 or ¥ 7,200

Name: Last Name ______________ First Name / Middle Name ______________

Birthday: year __________ month __________ day __________ Sex: M / F

Firm Name: ______________

Jurisdiction: ______________

Correspondence Address: ______________

____

Telephone: ______________ Facsimile: ______________

E-Mail: ______________

CHOICE OF COMMITTEES:

- [ ] Aerospace Law
- [ ] Cross-Border Investment
- [ ] Dispute Resolution and Arbitration
- [ ] Energy and Natural Resources
- [ ] Environmental Law
- [ ] Financial Institutions and Transactions
- [ ] Immigration, Nationality and Employment Law
- [ ] Insurance
- [ ] Intellectual Property
- [ ] Insolvency
- [ ] International Construction Projects
- [ ] International Trade
- [ ] Legal Practice
- [ ] Maritime Law
- [ ] Tax Law
- [ ] Women Business Lawyers
- [ ] Telecommunications

METHOD OF PAYMENT (please read each note carefully and choose one of the following methods):

[ ] US$ Check/Bank Draft/Money Order
- payable at US banks only (others may be returned to sender)

[ ] Japanese yen ¥ Check/Bank Draft
- payable at Japanese banks in Japan only (others may be returned to sender)

[ ] Credit Card - **Please note that Japanese yen dues shall apply to payment by credit cards.**
[ ] VISA [ ] Master [ ] Amex

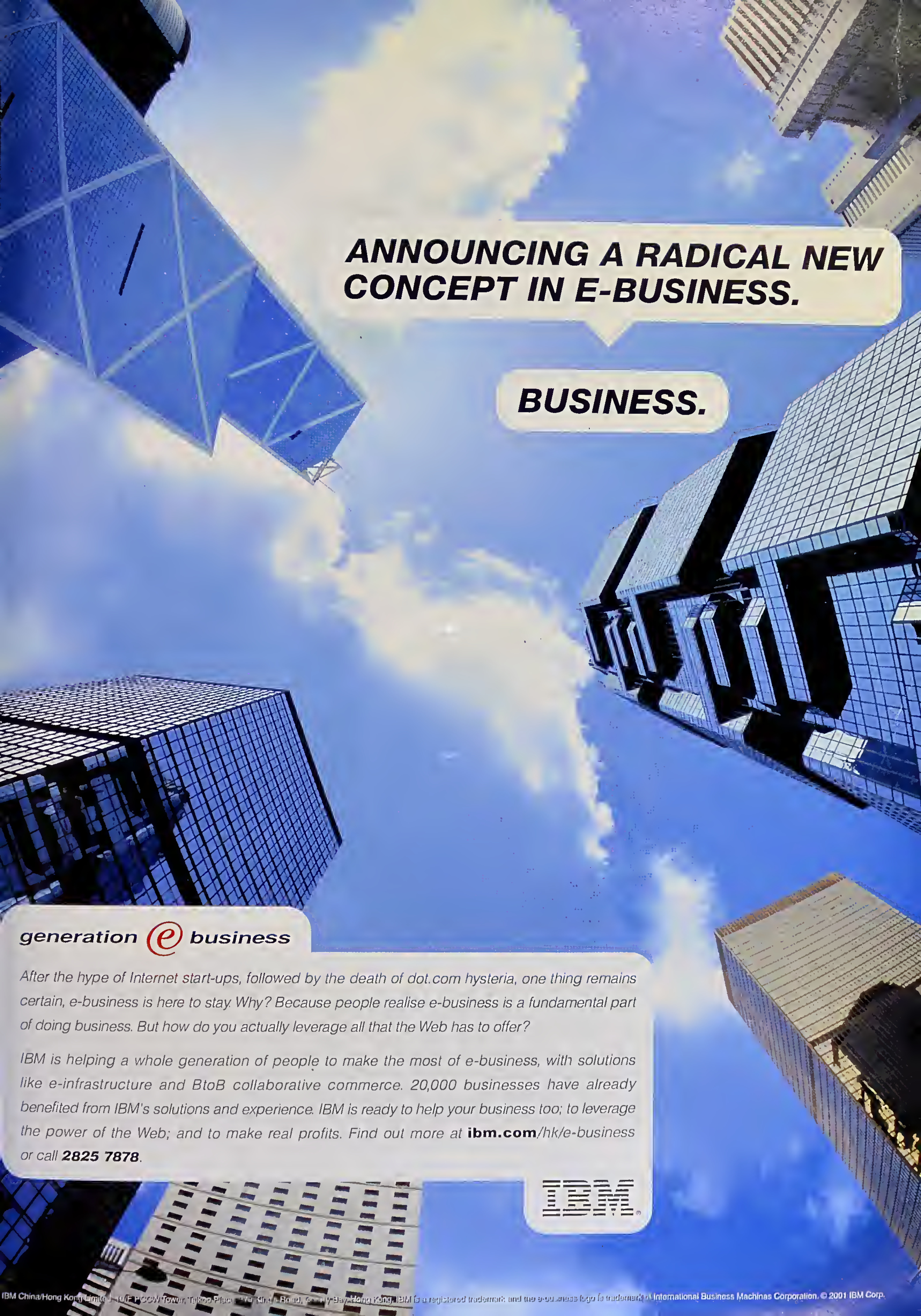
Card Number: ______________ Expiration Date: ______________

[ ] Bank Wire Transfer - Please make sure that remitting bank's handling charges are paid by the remitter him/herself.
to The Bank of Yokohama, Shinbashi Branch
A/C No. 1018885 (ordinary account)
1-5-13 Nishishinbashi, Minato-ku, Tokyo 105-0003, Japan

Signature: ______________ Date: ______________

PLEASE RETURN THIS FORM WITH REGISTRATION FEE OR PROOF OF PAYMENT TO:

Inter-Pacific Bar Association
Prime Square City 2/F, 1-1-7 Hiroo, Shibuya-ku, Tokyo 150-0012, Japan
Tel. 81-3-3409-2381 Fax. 81-3-3409-2033 E-Mail: ipba@tga.co.jp


ANNOUNCING A RADICAL NEW CONCEPT IN E-BUSINESS.
BUSINESS.
generation e business
After the hype of Internet start-ups, followed by the death of dot.com hysteria, one thing remains certain, e-business is here to stay. Why? Because people realise e-business is a fundamental part of doing business. But how do you actually leverage all that the Web has to offer?
IBM is helping a whole generation of people to make the most of e-business, with solutions like e-infrastructure and BtoB collaborative commerce. 20,000 businesses have already benefited from IBM's solutions and experience. IBM is ready to help your business too; to leverage the power of the Web; and to make real profits. Find out more at ibm.com/hk/e-business or call 2825 7878.
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